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# ENDA Before it Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees under the Proposed Employment Non-Discrimination Act

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# ENDA BEFORE IT STARTS: SECTION 5 OF THE FOURTEENTH AMENDMENT AND THE AVAILABILITY OF DAMAGES AWARDS TO GAY STATE EMPLOYEES UNDER THE PROPOSED EMPLOYMENT NON-DISCRIMINATION ACT

WILLIAM D. ARAIZA\*

**Abstract:** The United States Supreme Court's recent decision in *Board of Trustees of the University of Alabama v. Garrett* further circumscribed Congress' power to enforce the Fourteenth Amendment. The Court's recent decisions in this area insist that enforcement legislation be congruent and proportional to the constitutional violations sought to be remedied. The specter of reduced leeway for congressional enforcement authority requires Congress to approach such federal legislation carefully. The Employment Non-Discrimination Act (ENDA), proposed legislation prohibiting sexual orientation discrimination in employment, provides an interesting case study of the Court's recent Section 5 jurisprudence. This Article, after outlining historic and current Section 5 standards, uses *Garrett* as a guide to examine whether the Supreme Court would uphold ENDA's provision allowing state employees to sue their employers for certain types of retrospective relief. The Article both argues that ENDA is a valid expression of Congress' Section 5 power and provides strategies for navigating the increasingly narrow confines of Fourteenth Amendment enforcement power to provide critical employment protections.

In February 2001, the United States Supreme Court decided *Board of Trustees of the University of Alabama v. Garrett*,<sup>1</sup> holding that Title I of the Americans with Disabilities Act (ADA)<sup>2</sup> exceeded Con-

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<sup>1</sup> 121 S. Ct. 955 (2001).

<sup>2</sup> 42 U.S.C. §§ 12111-12117 (1990). The ADA prohibits employment discrimination against the disabled.

gress' power to enforce the Fourteenth Amendment.<sup>3</sup> *Garrett* marked a continuation of the Court's recent practice of closely scrutinizing federal legislation based on Congress' power to enforce the Fourteenth Amendment, the so-called "Section 5 power."<sup>4</sup> This line of cases,<sup>5</sup> most decided by the same 5–4 majority,<sup>6</sup> represents a sustained attempt by the Court to circumscribe what had previously been Congress' extremely broad enforcement power, reviewed deferentially by courts.<sup>7</sup> The cases all feature the Court's new insistence that such enforcement legislation demonstrate "congruence and proportionality" to the constitutional violations sought to be remedied.<sup>8</sup> In turn, those violations must either appear likely to the Court (because, for exam-

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<sup>3</sup> Section 5 of the Fourteenth Amendment reads: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

<sup>4</sup> See *id.*; see, e.g., *infra* note 5 and accompanying text.

<sup>5</sup> See generally *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>6</sup> The exception was the first case in the series, *City of Boerne*, 521 U.S. at 507–66. The majority in *City of Boerne* included Chief Justice Rehnquist, Justice Kennedy (the author), Justice Thomas, and, for most of the opinion, Justice Scalia. These four Justices have been members of the five-Justice majority in the other recent Section 5 cases. See, e.g., *Fla. Prepaid*, 527 U.S. at 629. The fifth member of that group, Justice O'Connor, dissented in *City of Boerne*, although she agreed with the majority's Section 5 analysis. See 521 U.S. at 544, 545 (O'Connor, J., dissenting). The *City of Boerne* majority also included Justices Stevens and Ginsburg, both of whom have dissented in subsequent Section 5 cases. See *id.* at 510; see also, e.g., *Coll. Sav. Bank*, 527 U.S. at 691–94. The line-up in *City of Boerne* was skewed by the Justices' disagreement over the proper standard for analyzing the underlying right that Congress was purporting to enforce, the Free Exercise Clause, as incorporated against the states through the Fourteenth Amendment's Due Process Clause.

<sup>7</sup> See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (holding that the proper standard for reviewing a congressional assertion of its Section 5 authority is whether the Court could perceive a basis for Congress' decision that enforcement of the Fourteenth Amendment would be furthered by the challenged statute); *id.* at 653 (stating that the scope of Congress' discretion under the Section 5 power was as broad as that under the Commerce Clause and other Article I grants of authority when combined with the Necessary and Proper Clause); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (using the same analysis for Congress' power to enforce the Fifteenth Amendment). The Court has indicated that the inquiry is the same for Congress' powers to enforce both the Fourteenth and Fifteenth Amendments. See *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 967 n.8 (2001); *Morgan*, 384 U.S. at 651 (noting the identity of the tests involving the congressional power to enforce the Fourteenth and Fifteenth Amendments and Congress' Article I powers); see also *James Everard's Breweries v. Day*, 265 U.S. 545, 558–59 (1924) (employing the same analysis for Congress' power to enforce the Eighteenth Amendment).

<sup>8</sup> See *Garrett*, 121 S. Ct. at 963; *Kimel*, 528 U.S. at 81; *Fla. Prepaid*, 527 U.S. at 639; *City of Boerne*, 521 U.S. at 520.

ple, they involve discrimination on some disfavored ground such as race) or because Congress has revealed a pattern and practice of unconstitutional conduct by the states.<sup>9</sup>

While these cases all point in the same direction with regard to the reduced leeway the Court now gives such legislation, each case deals with the vindication of a right that has a different type and level of grounding in the Constitution.<sup>10</sup> *City of Boerne v. Flores*<sup>11</sup> dealt with the Religious Freedom Restoration Act (RFRA).<sup>12</sup> RFRA attempted to protect religious freedom, a highly protected right explicitly enshrined in the Constitution and incorporated against the states via the Fourteenth Amendment's Due Process Clause.<sup>13</sup> RFRA attempted to undo the effects of a then-recent Supreme Court decision that identified a lower level of scrutiny as appropriate for free exercise claims.<sup>14</sup> The Court struck RFRA down, concluding that the statute was simply an attempt to reinterpret the Constitution rather than protect values the Court had identified in its free exercise jurisprudence.<sup>15</sup>

*Florida Prepaid v. College Savings Bank* also considered a statute guarding against state deprivations of a due process right, the property right in a patent.<sup>16</sup> In that case, the Court struck the statute down because Congress had not demonstrated a pattern of unconstitutional conduct justifying the statutory remedy.<sup>17</sup> The companion case, *College Savings Bank v. Florida Prepaid*, considered whether the Lanham Act's

<sup>9</sup> See *Garrett*, 121 S. Ct. 964; *Kimel*, 528 U.S. at 88–89; *Fla. Prepaid*, 527 U.S. at 640; *City of Boerne*, 521 U.S. at 530–32.

<sup>10</sup> See, e.g., *Kimel*, 528 U.S. at 62; *City of Boerne*, 521 U.S. at 507.

<sup>11</sup> 521 U.S. at 507.

<sup>12</sup> 42 U.S.C. § 2000bb (1994).

<sup>13</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); see also *City of Boerne*, 521 U.S. at 519.

<sup>14</sup> In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 882, 883 (1990), the Court significantly reduced the scope of the protection granted religious expression under the Free Exercise Clause, holding that a generally applicable law that incidentally burdened religious expression would be subjected only to a very deferential test. In so doing, the Court rejected the test approach set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), in which the Court subjected such laws to strict scrutiny, to the extent they substantially burdened religious expression. RFRA attempted to overturn the result in *Smith* by mandating the strict scrutiny test (narrowly tailored to meet a compelling government interest) before state and local governments could take actions that substantially burdened religious expression. See 42 U.S.C. § 2000bb-1.

<sup>15</sup> See *infra* notes 70–83 and accompanying text (discussing the Court's analysis in *City of Boerne*).

<sup>16</sup> 527 U.S. 627, 630 (1999).

<sup>17</sup> See *infra* notes 85–92 and accompanying text (discussing the Court's analysis in *Florida Prepaid*).

prohibition on false advertising bestowed on competitors of the alleged false advertiser a property right to be free from such unfair competition.<sup>18</sup> The Court rejected the argument that such a right existed in the Due Process Clause and thus concluded that the false advertising prohibition was not "appropriate" Section 5 legislation.<sup>19</sup>

*Kimel v. Florida Board of Regents* dealt with age discrimination, a claim made under the Equal Protection Clause of the Fourteenth Amendment.<sup>20</sup> However, the Court has held that age classifications are subject only to the lowest level of equal protection scrutiny—the well-known "rational basis" test—and has never struck down an age classification.<sup>21</sup> As Congress did not demonstrate actual instances of state age-related employment discrimination that would rise to the level of constitutional violations, the Court held that the Age Discrimination in Employment Act's (ADEA) application to the states exceeded Congress' Section 5 authority.<sup>22</sup>

*Garrett* completes the set of cases, as it deals with a right, an equal protection-based right against disability-based employment discrimination, that again receives only rational basis scrutiny.<sup>23</sup> Unlike age discrimination, however, disability discrimination (at least mental disability discrimination) has been found unconstitutional by the Court in one case, *City of Cleburne v. Cleburne Living Center*.<sup>24</sup> While *Cleburne* has apparently not heralded a new day of heightened judicial solicitude for the rights of the disabled, mentally or otherwise,<sup>25</sup> there is at least precedent on the books for finding such discrimination unconstitutional. Nevertheless, as in *Kimel*, the *Garrett* Court held that Congress had not found sufficient evidence of states' unconstitutional conduct justifying the broad prohibitions in the statute and struck

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<sup>18</sup> 526 U.S. 666, 675 (1999).

<sup>19</sup> See *id.* at 672–75.

<sup>20</sup> See generally 528 U.S. 62 (2000).

<sup>21</sup> See *Kimel*, 528 U.S. at 83 (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991)). See generally *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (*per curiam*).

<sup>22</sup> See *infra* notes 93–103 and accompanying text (discussing the Court's analysis in *Kimel*).

<sup>23</sup> 121 S. Ct. 955, 963, 964 (2000); see, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–46 (1985) (rejecting the application of heightened scrutiny to discrimination based on mental disability).

<sup>24</sup> 473 U.S. at 432.

<sup>25</sup> See *Heller v. Doe by Doe*, 509 U.S. 312, 321–28 (1993) (upholding a statute that treated persons with mental retardation less favorably than those with mental illness).

down application to the states of the Americans with Disabilities Act's (ADA) employment provisions.<sup>26</sup>

With the basic doctrine in place (the "congruence and proportionality" standard, the requirement that actual unconstitutional conduct be identified or at least obvious, and, more generally, stricter judicial scrutiny), and with examples of its application to the different types of rights guaranteed under the Fourteenth Amendment,<sup>27</sup> eyes should now turn to mapping the terrain of future challenges to Section 5 legislation. The proposed federal ban on employment discrimination based on sexual orientation presents an interesting Section 5 question. Such proposed legislation (in recent years entitled the Employment Non-Discrimination Act, or "ENDA"), has been introduced in Congress every year since 1994<sup>28</sup> and has gathered more support each time.<sup>29</sup> While the attitude of the Bush administration is unclear,<sup>30</sup> there is at least a possibility that the bill will be enacted in the next several years.<sup>31</sup> Such a law would almost assuredly be constitutional as an expression of Congress' commerce power, even after the Court's recent retrenchments in this area.<sup>32</sup> As such, it could also

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<sup>26</sup> See *infra* notes 104–127 and accompanying text (discussing the Court's analysis in *Garrett*).

<sup>27</sup> Obviously this is an oversimplification. Still, the basic outlines are now present: *City of Boerne* considered a fundamental due process right; *College Savings Bank* considered a right that was too tenuously linked to constitutionally protected "property" interests to be protected by the Due Process Clause; *Kimel* considered an equal protection argument that the Court had consistently rejected; and, *Garrett* considered one that the Court normally rejected, but had on one occasion accepted. See generally *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997). The situation the Court has not addressed since *City of Boerne* is legislation addressing an equal protection classification (such as gender or race) in which the Court has required application of strict judicial scrutiny.

<sup>28</sup> ENDA was introduced in the 103d Congress. See H.R. 4636, 103d Cong. (1994).

<sup>29</sup> See, e.g., *infra* note 31 and accompanying text.

<sup>30</sup> The Republican Platform states that "we do not believe sexual preference should be given special legal protection or standing in law." Republican Platform 2000, *Renewing America's Purpose Together* (2000), at <http://www.cnn.com/ELECTION/2000/conventions/republican/features/platform.00/#19> (last visited Nov. 30, 2001).

<sup>31</sup> ENDA was first introduced in the 103d Congress on June 23, 1994 and has been reintroduced every year since in at least one house. Most years the bill has died in committee; however, in 1996 the bill received its first floor vote and came within one vote of passage in the Senate. On July 31, 2001, the bill was reintroduced. As of September 28, 2001, the bill had forty-three co-sponsors in the Senate and 184 in the House, with members of both political parties serving as cosponsors.

<sup>32</sup> See *United States v. Morrison*, 529 U.S. 598, 610 (2000) (striking down 42 U.S.C. § 13981 (1994) as exceeding Congress' power under the Commerce Clause, but noting that the commerce power allows Congress to enact laws regulating activities that substan-

constitutionally be applied to the states, under the authority of *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>33</sup> The issue, analogous to those raised in *Kimel* and *Garrett*, would be whether plaintiffs (in this case, lesbian and gay state employees) could sue their state/employer for retrospective relief such as a damages award.<sup>34</sup> Such retrospective relief against a state cannot be authorized pursuant to a statute justified as an expression of Congress' Article I powers.<sup>35</sup> Thus, in order for such employees to collect damages, the statute would have to be supportable as an expression of Congress' Section 5 power.<sup>36</sup>

Thus, the question: Would ENDA be an appropriate enforcement statute under current Supreme Court doctrine? Part I of this Article examines the Supreme Court's Section 5 jurisprudence, paying special attention to the recent line of cases beginning with *City of Boerne*. Part II of this Article applies the Court's current approach to Section 5 legislation to the versions of ENDA introduced in recent congressional sessions.<sup>37</sup> It is clear that the current approach requires an examination of the suspicion with which the Court has regarded the underlying conduct being restricted. Applying that test to ENDA will require examining how seriously the Court is concerned about dis-

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tially affect interstate commerce and determining that the "substantial effects" test authorizes regulation of economic activity that in the aggregate substantially affects interstate commerce); *Unites States. v. Lopez*, 514 U.S. 549, 559-60 (1995) (striking down the Gun-Free School Zones Act of 1990, but noting the same congressional power as explained in *Morrison*).

<sup>33</sup> See 469 U.S. 528, 555-57 (1985) (holding that generally applicable laws can be constitutionally applied to the states in their capacity as participants in the national economy). The recent "anti-commandeering" cases do not disturb that result; they are more concerned with federal attempts to control the states in their capacities as governments. *Compare generally* *Printz v. United States*, 521 U.S. 898 (1997) (striking down federal attempt to direct a state's law enforcement operations) and *New York v. United States*, 505 U.S. 144 (1992) (striking down federal attempts to direct a state's legislative agenda) with *Reno v. Condon*, 526 U.S. 1111 (1999) (upholding a statute regulating the commerce in driver's license information, as it did not require the states to regulate their citizens in any particular way).

<sup>34</sup> *Compare* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (holding back pay to be an integral part of the "primary objective" of Title VII).

<sup>35</sup> See generally *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Indeed, the Court has also held that Article I does not empower Congress to make states suable for retrospective relief in their own courts. See *Alden v. Maine*, 527 U.S. 406, 430-31 (1999).

<sup>36</sup> See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Section 5 gives Congress the power to abrogate state immunity from suits seeking retrospective relief).

<sup>37</sup> See S. 1284, 107th Cong. § 501 (2001); S. 1276, 106th Cong. (1999); H.R. 2355, 106th Cong. (1999); H.R. 1858, 105th Cong. (1999); S. 869, 105th Cong. (1997); S. 2238, 103d Cong. (1994). Because ENDA is not yet law, this Article will cite from different versions of ENDA, suggesting the implications if an ultimately enacted ENDA statute contained or lacked that particular type of provision.

crimination against gays and lesbians. This, in turn, leads us to consider *Romer v. Evans*.<sup>38</sup> The task here will be to attempt to “translate” *Romer* into Section 5 language, much as the Court in *Garrett* attempted to translate *Cleburne*.<sup>39</sup> After considering whether *Romer* means that all sexual orientation discrimination in employment is constitutionally irrational, and reaching an equivocal conclusion, Part II continues by examining whether ENDA is sufficiently limited so as to prohibit only that discrimination which the Court would in fact consider unconstitutional. Assuming that ENDA does in fact go beyond what the Constitution commands, Part II concludes by considering whether ENDA constitutes appropriate prophylactic legislation, perhaps going beyond what equal protection requires but sufficiently related to those limits as to satisfy the Court’s test of “congruence and proportionality.” Part III of this Article takes a more prescriptive tone. Since ENDA has not yet been enacted, its proponents in Congress may well wish to consider *Garrett* and the other Section 5 cases as they draft new versions of the bill. Part III offers some unsolicited advice for those interested in ENDA’s enactment, suggesting ways in which the bill’s drafting, and especially its fact-finding, may maximize chances for its survival as an appropriate expression of Congress’ Section 5 power. In Part IV, the Article concludes by offering some general thoughts on the Court’s recent Section 5 jurisprudence, based on the results of the foregoing analysis of ENDA as legislation designed to ensure the equal protection rights of gay men and lesbians.<sup>40</sup>

## I. THE SUPREME COURT’S SECTION 5 JURISPRUDENCE

### A. *The Court’s Section 5 Jurisprudence Before City of Boerne*

The history of the modern Court’s interpretation of the Section 5 power is a familiar one and will be recounted only briefly here. In *Katzenbach v. Morgan*, the Court upheld as a valid exercise of the Sec-

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<sup>38</sup> 517 U.S. 620, 635–36 (1996) (striking down Amendment 2, a Colorado constitutional provision prohibiting the state or its subdivisions from banning discrimination on the basis of sexual orientation).

<sup>39</sup> See *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 963–64 (2001).

<sup>40</sup> For convenience, this Article uses the term “homosexual” and “gay” interchangeably, to denote gay, lesbian, or bisexual status or conduct (depending on the context). The analysis in this Article does not purport to address the employment rights of transgendered people as those rights might be protected by the Constitution, ENDA, or extant federal antidiscrimination law, most notably Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex.

tion 5 power a provision of the Voting Rights Act that allowed graduates of the sixth grade of accredited Spanish-language schools in Puerto Rico to vote, notwithstanding state English-literacy qualification tests.<sup>41</sup> Even though the Court had previously held that such literacy tests did not violate the Equal Protection Clause,<sup>42</sup> the Court concluded that the statute was an appropriate use of Congress' Section 5 power.<sup>43</sup> Writing for a five-member majority, Justice Brennan enunciated an extremely deferential test for Section 5 legislation. Quoting directly from *McCulloch v. Maryland*, the Court held that the scope of the Section 5 power was governed by the same broad test applicable to exercises of Congress' Article I power: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."<sup>44</sup> In a case decided the same year as *Morgan*, the Court had enunciated that same standard as governing the scope of Congress' analogous power to enforce the Fifteenth Amendment.<sup>45</sup>

Turning to the merits, the Court put forth two justifications for upholding the statute. First, providing voting rights for Puerto Ricans might be thought to assist in ensuring equal responsiveness to their concerns from the political process.<sup>46</sup> Second, and more controversially, the Court stated that Congress may reasonably have thought that the English literacy test itself violated the Equal Protection Clause, despite what the Court had itself held several years before.<sup>47</sup> This potentially revolutionary grant of interpretive power to Congress elicited a sharp dissent from Justice Harlan<sup>48</sup> and has been controversial ever since.<sup>49</sup> Still, *Morgan* laid the foundation for two principles of

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<sup>41</sup> 384 U.S. 641, 652 (1966).

<sup>42</sup> See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 52-53 (1959).

<sup>43</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966).

<sup>44</sup> *Id.* at 650 (quoting *McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316, 421 (1819)); see also *id.* ("By including section five the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.").

<sup>45</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); see also *Morgan*, 384 U.S. at 651 (citing *South Carolina* for the *McCulloch* proposition).

<sup>46</sup> See *Morgan*, 384 U.S. at 652-53.

<sup>47</sup> See *id.* at 653-56.

<sup>48</sup> See *id.* at 659, 668-70 (Harlan, J., dissenting).

<sup>49</sup> See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 259-64 (1983) (Burger, C.J., dissenting) (arguing that application of the Age Discrimination Employment Act to state employers was authorized by neither the Commerce Clause nor as a provision enforcing Section 5 of

the Court's Section 5 jurisprudence: deferential review of the appropriateness of Section 5 legislation and a broad conception of what the Section 5 power allows Congress to do.

Retrenchment was quick in coming. Four years later, in *Oregon v. Mitchell*, a severely fractured Court was unable to agree on a rationale for upholding Congress' decision to lower the voting age to eighteen in federal elections, while striking down Congress' decision to do the same with regard to state elections.<sup>50</sup> Justice Black, the fifth vote for both of these holdings, tied his Section 5 analysis to the existence of other textual authority for Congress to act in this area.<sup>51</sup> Thus, as other parts of the Constitution gave Congress the power to regulate elections for federal offices,<sup>52</sup> Justice Black concluded that Congress had greater power under Section 5 to go beyond what he saw as the Fourteenth and Fifteenth Amendments' overriding concern with race discrimination.<sup>53</sup> By contrast, he was not willing to grant Congress such broad power under its authority to "enforce" the Fourteenth or Fifteenth Amendments when it was acting in an area not directly addressed by those provisions.<sup>54</sup> Justice Harlan, writing for himself only, would have struck the statute down as applied to both federal and state elections.<sup>55</sup> He agreed that the Fourteenth Amendment did not address the issue of voting rights<sup>56</sup> and questioned *Morgan's* deferential standard for reviewing Section 5 enactments.<sup>57</sup> Justice Stewart, joined by two other Justices, also would have struck down both applications of the statute.<sup>58</sup> He agreed with Justice Black that the Constitution gave the states the authority to regulate elections and refused to

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the Fourteenth Amendment and specifically critiquing the theory that Congress can expand Fourteenth Amendment rights via Section 5); Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106 (1966) (describing this rationale as "a strikingly novel form of judicial deference to congressional power").

<sup>50</sup> See generally 400 U.S. 112 (1970). Other voting access provisions were upheld by larger majorities in this case.

<sup>51</sup> See generally *id.*

<sup>52</sup> See *id.* at 119-24 (opinion of Black, J.).

<sup>53</sup> See *id.* at 126-30 (opinion of Black, J.).

<sup>54</sup> See *id.* at 130 (opinion of Black, J.).

<sup>55</sup> See *Oregon*, 400 U.S. at 152 (Harlan, J., concurring in part and dissenting in part).

<sup>56</sup> See *id.* at 152, 200 (Harlan, J., concurring in part and dissenting in part); *id.* at 212, 213 (Harlan, J., concurring in part and dissenting in part) (concluding that the only possible Section 5 justification for the statute lay in the possibility that states were engaged in invidious discrimination against 18-to-21 year-olds and rejecting that argument).

<sup>57</sup> See *id.* at 152, 204-09 (Harlan, J., concurring in part and dissenting in part).

<sup>58</sup> *Id.* at 281 (Stewart, J., concurring in part and dissenting in part).

give *Morgan* a broad reading.<sup>59</sup> Thus, in *Oregon*, five Justices questioned the scope of the Section 5 power as construed in *Morgan*.<sup>60</sup> Nevertheless, *Oregon* remains a weak precedent given its fractured nature and the special circumstances of the case, namely, Articles I and II's arguably clear delegation of the election regulation power to the states and the explicit conclusion of at least two Justices that the Fourteenth Amendment simply had nothing to say about age-based discrimination in voting.<sup>61</sup>

Ten years after *Oregon*, the Court in *City of Rome v. United States* upheld Congress' power under the enforcement provision of the Fifteenth Amendment to prohibit changes in state election laws that had either the purpose or the effect of diluting black voting strength.<sup>62</sup> The same day the Court decided *City of Rome*, it also held that state action, in order to violate the Fifteenth Amendment, had to evince purposeful discrimination.<sup>63</sup> In allowing Congress to prohibit a practice the Court had just held to be constitutional, the *City of Rome* Court reasoned that Congress might have found that disparate impact suggested discriminatory intent but that such intent might be difficult to prove.<sup>64</sup> Thus, according to the Court, Congress had the power to craft a prophylactic rule—what Laurence Tribe has described as “almost a rule of evidence”<sup>65</sup>—that prohibited electoral changes with racially disparate impact because so many of those changes might

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<sup>59</sup> See *id.* at 281, 285–92, 294, 296 (Stewart, J., concurring in part and dissenting in part) (viewing *Morgan* as giving congressional power under Section 5 “the furthest possible legitimate reach”).

<sup>60</sup> See *id.* at 112. Other commentators disagree, finding in *Oregon* an implicit reaffirmation of *Morgan*'s broad power. See, e.g., Bonnie I. Robin-Vergeer, *Disposing of Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 718–23 (1996).

<sup>61</sup> See *supra* notes 53–56 and accompanying text; see also *supra* note 58 and accompanying text. Justice Brennan, the author of *Morgan*, wrote in *Oregon* for himself and two other Justices and would have upheld the statute's application to both federal and state elections. See *Oregon*, 400 U.S. at 229 (Brennan, J., concurring in part and dissenting in part). He characterized *Morgan* as resting on the superior fact finding capabilities of Congress when compared with those of the judiciary. See *id.* at 248–50 (Brennan, J., concurring in part and dissenting in part). Justice Douglas would also have upheld the statute in its entirety. See *id.* at 135 (Douglas, J., concurring in part and dissenting in part). He also relied on *Morgan* and would have applied that case's deferential standard of review to Congress' decision that lowering the voting age was appropriate in order to secure equal protection. See *id.* at 141–44 (Douglas, J., concurring in part and dissenting in part).

<sup>62</sup> See generally *City of Rome v. United States*, 446 U.S. 156 (1980).

<sup>63</sup> See generally *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>64</sup> See *City of Rome*, 446 U.S. at 177 (1980).

<sup>65</sup> See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 5–14, at 338 (2d ed. 1988).

have been motivated by racial discriminatory intent.<sup>66</sup> This rationale can be understood as a “wider net” theory, in which a wider net of conduct might be prohibited than that which was actually unconstitutional in order to be sure to catch all actual constitutional violations. According to the *City of Rome* Court, such a rationale derived naturally from Congress’ power to enforce the Fifteenth Amendment.<sup>67</sup>

Thus, in 1997 when the Court decided *City of Boerne v. Flores* it had before it a tradition of broad readings of Congress’ enforcement power. *Morgan* had been the high-water mark, with its intimation that Congress had the power to interpret the Fourteenth Amendment.<sup>68</sup> But even leaving that particular holding aside, the general standard of deference enunciated in *Morgan* and *South Carolina v. Katzenbach*, and the wider net concept endorsed in *City of Rome*, all pointed to congressional power to go beyond the actual guarantees of the Fourteenth Amendment when crafting remedial or deterrent legislation and broad discretion to decide on the need for such legislation. *City of Boerne*, however, ushered in a new era.<sup>69</sup>

### B. *The Change Wrought by City of Boerne*

Starting with *City of Boerne*, the Court began to cut back on the deference it had previously given to Congress’ decisions to use its Section 5 power.<sup>70</sup> In *City of Boerne*, the Court struck down RFRA, which purported to enforce the Due Process Clause’s guarantee of free religious expression, incorporated from the Free Exercise Clause of the First Amendment.<sup>71</sup> RFRA accomplished this by prohibiting state and local governments from substantially burdening religious exercise, even via a generally applicable law that did not single out religious expression, unless the burden was justifiable under the strict scrutiny test of narrow tailoring and a compelling government interest.<sup>72</sup> The strict scrutiny test imposed by RFRA was similar to the Court’s own

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<sup>66</sup> See *City of Rome*, 446 U.S. at 117.

<sup>67</sup> See 446 U.S. at 173–78. It bears repeating that the Court has consistently viewed the enforcement provisions of the Fourteenth and Fifteenth Amendments to be identical, except of course for the subject matter to which such enforcement legislation can be addressed. See cases cited *supra* note 7.

<sup>68</sup> 384 U.S. 641, 650 (1966).

<sup>69</sup> See discussion *infra* Part I.B.

<sup>70</sup> See generally *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>71</sup> See *id.* at 519.

<sup>72</sup> See *id.* at 515 (discussing 42 U.S.C. § 2000bb-1 (1994)).

rule for deciding free exercise cases between 1963 and 1990, when it replaced it with a test that was much less demanding.<sup>73</sup>

In striking down RFRA, the Court enunciated principles that it has since applied several times when deciding the scope of the Section 5 power. Most importantly, the Court required, for the first time, that legislation defended as an exercise of the Section 5 power reflect a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>74</sup> The Court held that RFRA failed this test.<sup>75</sup> First, in discussing congruence,<sup>76</sup> it concluded that the legislative record revealed no examples of laws enacted because of religious bigotry, which the Court identified as the basic evil sought to be prevented by the Free Exercise Clause.<sup>77</sup> The record did reveal examples of laws burdening religious exercise, but these were only tangential to the value the Court had identified in the Free Exercise Clause and thus the value Congress was authorized to protect through its Section 5 power.<sup>78</sup> The Court also held that RFRA was not proportional to any violations that might exist, since it was not the case that many actions thereby prohibited would have been unconstitutional.<sup>79</sup> Thus, the Court distinguished RFRA from statutes such as the Voting Rights Act, which was upheld in cases such as *City of Rome* on the "wider net" theory discussed above.<sup>80</sup> Given this lack of proportionality, the *City of Boerne* Court concluded that RFRA was

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<sup>73</sup> Indeed, the Court saw in RFRA an attempt to move the law even beyond the Court's pre-Smith jurisprudence, as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), toward an even more accommodating attitude toward religion. See *City of Boerne*, 521 U.S. at 535 (RFRA "imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-Smith jurisprudence RFRA purported to codify."). See generally *Employment Div., Dep't. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). With respect to the less demanding test, see, e.g., *Smith*, 494 U.S. at 872. A fuller explanation of the *Smith* Court's analysis and rejection of *Sherbert*'s strict scrutiny test is provided in *City of Boerne*, 521 U.S. at 512–16.

<sup>74</sup> *City of Boerne*, 521 U.S. at 520.

<sup>75</sup> *Id.* at 530–34.

<sup>76</sup> This Article will not focus on the distinction, whatever it may be, between the "congruence" and "proportionality" requirements. As will become clear, both requirements speak to the same basic concern about the fit between the statute's limits on state action and the constitutional violation it seeks to remedy.

<sup>77</sup> See *City of Boerne*, 521 U.S. at 530–32, 535.

<sup>78</sup> See *id.* at 531.

<sup>79</sup> See *id.* at 532.

<sup>80</sup> See *id.* at 530–32; *City of Rome v. United States*, 446 U.S. 156, 117, 177 (1980); *TRIBE*, *supra* note 65.

simply an attempt to interpret the Fourteenth Amendment, not to enforce it.<sup>81</sup>

Thus, *City of Boerne* establishes several points about the Court's modern Section 5 jurisprudence. Most basically, that jurisprudence entails much more careful judicial scrutiny than previously needed. In particular, the Court now requires some measure of fit between statutory means and the constitutional violations supplying their underlying rationale. This fit must include at least some evidence of violations of the underlying constitutional right. For example, in *City of Boerne* the Court noted that Congress did not find examples of states engaging in religious bigotry (the underlying value in the Free Exercise Clause, at least under *Employment Division, Department of Human Resources of Oregon v. Smith*).<sup>82</sup> This "fit" requirement also seems to demand at least some rationale for the scope of the remedial statute that is linked to violations of the underlying right. In *City of Boerne*, the Court noted that most practices outlawed by RFRA would probably be constitutional and thus criticized the statute for sweeping too broadly.<sup>83</sup> These two sides of the "fit" requirement are closely related, of course: If the statute addressed an area where there was little evidence of unconstitutional conduct, it would follow that the statute would also be overly broad in relation to those underlying violations.

### C. Florida Prepaid and Kimel: Variations on the Theme

In *Florida Prepaid v. College Savings Bank* and *Kimel v. Florida Board of Regents*, the Court reaffirmed the approach it crafted in *City of Boerne*.<sup>84</sup> The circumstances of each case, however, led the Court to apply that approach in slightly different ways.

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<sup>81</sup> See *City of Boerne*, 521 U.S. at 533, 534 (stating, after discussing the stringency of the strict scrutiny standard codified in RFRA, that "[w]e make these observations not to reargue the position of the majority in *Smith* [against using strict scrutiny in this area] but to illustrate the substantive alteration of its holding attempted by RFRA").

<sup>82</sup> See *id.* at 530, 531.

<sup>83</sup> See *id.* at 532.

<sup>84</sup> *College Savings Bank*, while also rejecting Section 5 as a valid basis for the challenged statute, was decided on an issue preliminary to the *City of Boerne* analysis. See generally *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627 (1999); *City of Boerne*, 521 U.S. 507 (1997). In *College Savings Bank*, the Court held that the Lanham Act's prohibition on false advertising did not give businesses a property right in avoiding the unfair competition such false advertising might cause. See 527 U.S. at 673. Because there was no property interest, and thus no right under the Due Process Clause, the Court did not have to consider whether the statute was an appropriate means for enforcing such a right. See *id.* at 675. In the same term the Court decided *Kimel*, it also decided *United States v. Morrison*, 529 U.S. 598 (2000), in which it held, *inter alia*, that the federal Violence

### 1. *Florida Prepaid*

The issue in *Florida Prepaid* was Congress' amendment to federal patent law, making states liable for infringement suits.<sup>85</sup> The Court held that the law was not an appropriate use of Congress' Section 5 power.<sup>86</sup> The Court made explicit what it had suggested in *City of Boerne*; namely, that Section 5 requires Congress both to identify the conduct actually violating the Fourteenth Amendment (in this case, the Due Process Clause) and to tailor its legislative scheme to remedying or preventing such violations.<sup>87</sup> Applying these requirements, the Court in *Florida Prepaid* concluded that Congress had failed to identify such violations, which the Court defined as not just patent infringements, but patent infringements that deprived the patent holder of property<sup>88</sup> without due process.<sup>89</sup> Examining the record, the Court concluded that "Congress appears to have enacted [the statute] in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution."<sup>90</sup> The Court also found fault with the proportionality of the statute, concluding that it was not tailored to focus on unconstitutional conduct, but instead made states liable whenever they infringed on a patent, regardless of, for example, whether the infringement was merely negligent (and thus not a "deprivation" of property) or whether the state provided remedies for deprivations (and thus did not fail to provide "due process").<sup>91</sup> Tellingly, the Court distinguished earlier precedent, namely, *South Carolina*, on the ground that the statute upheld in that case did include various

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Against Women Act (VAWA) did not constitute appropriate remedial legislation under Section 5. VAWA provided the victim of a gender-based crime of violence a private right of action against her attacker. 42 U.S.C. § 13981 (1994). In holding that the statute was not appropriate Section 5 legislation, the Court concluded that it failed the congruence and proportionality test because it was directed not at state action, but at the action of private parties (the attackers). See *Morrison*, 529 U.S. at 625–26. Because VAWA directed the remedy towards private parties, and the statutes in *City of Boerne*, *Kimel*, *Florida Prepaid*, *Garrett*, and ENDA itself proscribe a remedy directed at the state actor, *Morrison* is of very limited relevance. For this reason, this Article will not discuss *Morrison* any further.

<sup>85</sup> See generally 527 U.S. 627 (1999).

<sup>86</sup> *Id.* at 647.

<sup>87</sup> See *id.* at 639.

<sup>88</sup> The Court held that mere negligent infringement did not constitute, for due process purposes, a "deprivation" of the "property" that is a patent. See *id.* at 645.

<sup>89</sup> See *id.* at 640–43.

<sup>90</sup> *Fla. Prepaid*, 527 U.S. at 645–46; see also *id.* at 647 ("The examples of States avoiding sovereign immunity in a federal-court patent action are scarce enough [in the historical record], but any plausible argument that such action on the part of the State deprived patentees of property and left them without a remedy under state law is scarcer still.").

<sup>91</sup> See *id.* at 646–47.

limits and thus was proportional to the violations it attempted to remedy.<sup>92</sup>

## 2. *Kimel*

*Kimel*, decided in 2000, was the first case after *City of Boerne* in which the Court faced a statute that implicated the Court's three-tiered, class-based analysis under the Equal Protection Clause.<sup>93</sup> In *Kimel*, a state challenged the Section 5 authority for the Age Discrimination in Employment Act (ADEA).<sup>94</sup> Again applying the "congruence and proportionality" requirements to strike down the law, the Court began by noting that age classifications challenged as violations of equal protection receive only rational basis review.<sup>95</sup> Indeed, the Court noted that it had never concluded that a state's age discrimination violated the Equal Protection Clause.<sup>96</sup> Given its reluctance to strike down such discrimination, the Court concluded that application of the ADEA to the states violated the proportionality requirement.<sup>97</sup>

But the fact that age discrimination receives only rational basis review by the Court, with the Court having rejected every such age discrimination claim it heard, did not mean the end of the case. Instead, the Court at least considered the plaintiffs' argument that limitations on ADEA liability meant that the statute prohibited only age discrimination that was so unreasonable as to be unconstitutionally irrational or at least so unreasonable such that the statute could be considered proportional to the underlying constitutional violation.<sup>98</sup> The Court rejected this argument, concluding that the ADEA's exceptions and limitations were sufficiently narrow such that the statute did in fact prohibit a broad swath of conduct that would survive rational basis scrutiny in a constitutional challenge.<sup>99</sup> The Court's rejection of the plaintiff's argument, however, is less important than the fact that they considered it serious enough to warrant several pages of statutory analysis. Such consideration suggests that the Court seems to have recognized that conduct could still theoretically be unconstitu-

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<sup>92</sup> See *id.* at 647 (citing *City of Boerne's* discussion of *City of Rome*).

<sup>93</sup> See generally 528 U.S. 62 (2000).

<sup>94</sup> 29 U.S.C. § 626(b) (1994); 528 U.S. 62, 66, 67 (2000).

<sup>95</sup> See *Kimel*, 528 U.S. at 82–86.

<sup>96</sup> See *id.* at 83.

<sup>97</sup> See *id.* at 86.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.* at 86–89.

tional and thus appropriately proscribable by Congress acting pursuant to Section 5, even if it was judged only under the rational basis standard.<sup>100</sup>

Finally, the Court considered the possibility that the ADEA's applicability to the states might have been justified as a response to a "difficult" or "intractable" problem.<sup>101</sup> The Court seems here to be indicating that unconstitutional age discrimination might be a serious problem, difficult to prove, or otherwise impervious to correction, thus requiring an aggressive legislative response. In considering that possibility, the Court examined the legislative record to determine whether there was in fact a significant problem with states engaging in unconstitutional age discrimination.<sup>102</sup> Reviewing the legislative record for examples of such discrimination engaged in by states, the Court concluded that the record did not reveal such a problem, dismissing the plaintiffs' evidence of congressional concern about age discrimination by state government as "isolated sentences clipped from floor debates and legislative reports."<sup>103</sup>

Thus, in *Kimel*, the Court presented the situation as one combining a deferential judicial review standard for age discrimination with a broad-based legislative prohibition on such discrimination unaccompanied by evidence that Congress perceived a significant problem with state government age discrimination. This picture strongly suggested that the Court would be skeptical of any Section 5 legislation addressing discrimination against groups that do not receive heightened judicial protection, at least in the absence of significant legislative evidence that a constitutional problem does in fact exist. Before that suggestion could solidify, however, the Court had to confront one additional fact pattern.

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<sup>100</sup> See *Kimel*, 528 U.S. at 86-89.

<sup>101</sup> *Id.* at 88; see also Fla. Prepaid Post Secondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646 (1999) ("Though the lack of support in the legislative record is not determinative . . . identifying the targeted constitutional wrong or evil is still a critical part of our Section 5 calculus because 'strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.'" (quoting *City of Boerne v. Flores*, 521 U.S. 527, 530 (1997))).

<sup>102</sup> *Kimel*, 528 U.S. at 89.

<sup>103</sup> *Id.*; see also *id.* at 90 (describing the record as being "assorted sentences . . . cobble[d] together").

### D. Garrett and the Problem of Cleburne

*Board of Trustees of the University of Alabama v. Garrett* completes the set of general situations the Court could face when confronting a Section 5 statute.<sup>104</sup> In *Garrett*, the Court, by the same 5–4 majority that decided *Kimel* and *Florida Prepaid*, struck down the application of Title I of the ADA to the states, to the extent that statute authorized private party lawsuits seeking damages against states that had not consented to federal jurisdiction.<sup>105</sup> Applying the congruence and proportionality test, Chief Justice Rehnquist began by noting that state discrimination against the disabled was subject only to the rational basis standard, which allowed the disabled to be treated differently if there were any rational reason for doing so.<sup>106</sup> So far, this was no different from the analysis in *Kimel*, which noted that the same deferential review applied to age classifications.<sup>107</sup> But in *Garrett*, the Court confronted a challenge beyond that faced in *Kimel*. Unlike age classifications, the Court had at least once struck down an instance of disability discrimination as failing the rational basis standard.<sup>108</sup> Thus, while the lack of suspect class status (and the attendant heightened review) may have made it very difficult for Congress to justify legislation benefiting that group, the Court in *Garrett* had to confront the fact that on at least one occasion, it had found discrimination against the group to be so unreasonable as to fail the rational basis test. The question then arose: Given that the Court itself had found such unconstitutional discrimination against the group, would not application of the ADA to the states “enforce” against such discrimination?

The majority’s response to this proposition, however, was not encouraging. While it noted and reaffirmed *City of Cleburne v. Cleburne Living Center*’s conclusion that negative attitudes or fears alone could not justify government action, the Court in *Garrett* described its holding in *Cleburne* as resting on standard rational basis review, as opposed to the less deferential type of review commentators (and other mem-

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<sup>104</sup> As noted above, this statement is something of an oversimplification but still essentially accurate. See *supra* note 27 and accompanying text.

<sup>105</sup> See Bd. of Tr. of the Univ. of Ala. v. Garrett, 121 S. Ct. 955, 967, 968 (2001). Presumably, the Court would also prohibit such a lawsuit against an unconsenting state in state court, given the result in *Alden v. Maine*, 527 U.S. 706 (1999) (holding that general principles of state sovereign immunity prevent Congress from authorizing private party lawsuits for retrospective relief against unconsenting states in state court when the federal law is based on an Article I power).

<sup>106</sup> See *Garrett*, 121 S. Ct. at 963–64.

<sup>107</sup> See 528 U.S. at 83.

<sup>108</sup> See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449, 450 (1985).

bers of the Court) had seen in *Cleburne*.<sup>109</sup> By reading *Cleburne* as the exceptional situation where standard rational basis review required that a statute be struck down, the Court laid the foundation for concluding that there was no pattern and practice of such unusually irrational discrimination. In turn, that conclusion led it to hold that the ADA was not congruent and proportional to such violations that did exist and thus was invalid as Section 5 legislation.

Again, as in *Kimel*, the Court considered the evidence Congress had marshaled regarding the constitutional problem posed by disability discrimination.<sup>110</sup> In examining the legislative record, Chief Justice Rehnquist started by severely limiting the scope of the data it was willing to consider.<sup>111</sup> In particular, the Court insisted on excluding not just examples of private discrimination but also discrimination performed by units of local governments, on the theory that such units did not enjoy the protection of the Eleventh Amendment and thus could be sued for retrospective relief without Congress having to use its Section 5 authority.<sup>112</sup>

Turning to actual examples of state government discrimination against the disabled, the Court noted that the record included examples of "half a dozen" instances of state government discrimination.<sup>113</sup> It found these instances to be insufficient, observing that it was not clear whether those acts of discrimination were unconstitutionally irrational.<sup>114</sup> The Court noted that Congress had failed to make a formal legislative finding that states were acting unconstitutionally and similarly failed to state such a conclusion in the committee reports on the ADA.<sup>115</sup> It also noted that accounts of state discrimination against the disabled cited in Justice Breyer's dissenting opinion were submitted not directly to Congress, but to the Task Force on the Rights and

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<sup>109</sup> Compare *Garrett*, 121 S. Ct. at 963 n.4 (describing *Cleburne* as based on "the basic principles of rationality review"), with, e.g., Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L. REV. 591, 607-16 (1999-2000) (discussing the Court's approach in *Cleburne* and concluding that the majority applied a test more stringent than the normal rational basis review), and *Cleburne*, 473 U.S. at 459 (Marshall, J., concurring in the result and dissenting in part).

<sup>110</sup> See *Garrett*, 121 S. Ct. at 964-66.

<sup>111</sup> See *id.* at 965.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* The Court cited, among others, a state university's refusal to hire a person because of his blindness and a state agency's firing of an employee because of his epilepsy. See *id.* at 965.

<sup>114</sup> See *Garrett*, 121 S. Ct. at 965.

<sup>115</sup> See *id.* at 965-66.

Empowerment of Americans With Disabilities, which had also failed to make findings about unconstitutional conduct by the states.<sup>116</sup>

Moving on to the actual content of the ADA, the Court concluded that the statute's provisions went beyond what was required under the rational basis standard, rendering the ADA a disproportionate response to whatever constitutional problem may exist.<sup>117</sup> It noted that the ADA required employers to make "reasonable accommodations" for disabled individuals otherwise able to perform their jobs<sup>118</sup> and concluded that failure to provide those accommodations might be perfectly rational, though cruel—in the Court's words, "hardheaded" though perhaps "hardhearted."<sup>119</sup> The Court found similar problems with other provisions of the ADA, including its placing of the burden on the employer to show that a requested accommodation would constitute an undue burden (and thus not required under the statute)<sup>120</sup> and its prohibition of standards that had a disparate impact on the disabled.<sup>121</sup> According to the majority, these provisions, like the "reasonable accommodation" requirement, went beyond what the Constitution required, all in the context of an area where the Court was unconvinced that Congress had demonstrated the existence of a constitutional problem.

The Court concluded by comparing the ADA, once again,<sup>122</sup> with the provisions of the Voting Rights Act upheld in *South Carolina*.<sup>123</sup> The Court described those provisions as a "detailed but limited remedial scheme" applicable "in those areas of the Nation where abundant evidence of States' systematic denial of [constitutional voting] rights was identified."<sup>124</sup> It pointed to the careful examination of the issue that Congress undertook before enacting the Voting Rights Act and to

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<sup>116</sup> See *id.* at 966.

<sup>117</sup> See *id.*

<sup>118</sup> See *id.* at 966–67 (citing the ADA).

<sup>119</sup> See *Garrett*, 121 S. Ct. at 964; see also *id.* at 966–67 (stating that "it would be entirely rational (and therefore constitutional)" for a state to refuse to make the "reasonable accommodation[s]" required by the ADA).

<sup>120</sup> See *id.* at 967.

<sup>121</sup> See *id.* (comparing the ADA's disparate impact test with the constitutional test for equal protection, which requires discriminatory intent, citing *Washington v. Davis*, 446 U.S. 229, 239 (1976)).

<sup>122</sup> See *supra* note 92 and accompanying text (citing *City of Boerne's* and *Florida Prepaid's* comparison of the statutes those cases struck down with the statute upheld in *South Carolina*).

<sup>123</sup> See *Garrett*, 121 S. Ct. at 967.

<sup>124</sup> *Id.*

its documentation of "a marked pattern of unconstitutional action by the States."<sup>125</sup>

Concurring, Justice Kennedy, joined by Justice O'Connor, lauded the purposes of the ADA, but suggested that state violations of the ADA might not have their base in "embod[iments of] the misconceived or malicious perceptions of some of their citizens."<sup>126</sup> He noted that allegations of unconstitutional disability discrimination had not been made to federal or state courts and agreed with the Court that Congress had also failed to supply such a record.<sup>127</sup>

### E. *The Current Law of Section 5*

After *City of Boerne*, *Florida Prepaid*, *Kimel*, and *Garrett*, certain propositions about Congress' Section 5 power seem clear. First, the Court is shying away from the idea expressed in *Morgan* that Section 5 authorizes Congress to engage in its own interpretation of the Fourteenth Amendment and that congressional interpretation is owed deference by the Court.<sup>128</sup> Second, *Morgan's* general level of deference to Congress' Section 5 authority—expressed as *McCulloch's* broad formulation of judicial deference to legislative judgments concerning the need for and breadth of Article I-justified regulation—may be less secure, in light of both the Court's careful review regarding whether constitutional violations exist that justify Section 5 legislation and its requirement that such legislation be limited in scope so as to correspond to the constitutional violation it seeks to address.<sup>129</sup> The recent cases' consistent references to *South Carolina* and their descriptions of the Voting Rights Act provisions upheld in that case as carefully limited suggest as much.<sup>130</sup>

The Court has also indicated that it will closely scrutinize statutes benefiting groups that do not enjoy heightened judicial protection under the Equal Protection Clause. This seems true even if, as in

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 968 (Kennedy, J., concurring).

<sup>127</sup> *Id.* (Kennedy, J., concurring).

<sup>128</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 527–29 (1997).

<sup>129</sup> Compare e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (scrutinizing the legislative record to determine whether Congress had found a pattern of unconstitutional state discrimination against the elderly), with *Katzenbach v. Morgan*, 384 U.S. 641, 652–56 (1966) (asking if Congress' likely conclusions were reasonable).

<sup>130</sup> See *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 967 (2001); *City of Boerne*, 521 U.S. at 532–33; see also *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (citing the *City of Boerne* discussion of the limited nature of the Voting Rights Act's provisions).

*Garrett*, the statute benefited a group that the Court had found in the past to have been the victim of unconstitutionally irrational discrimination.<sup>131</sup> Again, this close scrutiny will entail an examination of whether the scope of the statute is limited in a way corresponding to the constitutional violations found.<sup>132</sup> On the other hand, the Court has continued to endorse the "wider net" theory of cases like *City of Rome*, allowing Congress to prohibit broader swaths of conduct than would be forbidden under the Fourteenth Amendment itself as long as there is a sufficient factual record supporting the need for the broader legislation.<sup>133</sup> The Court has also continued to insist that it respects Congress' determinations about what is needed to guarantee Fourteenth Amendment rights.<sup>134</sup>

As a rough description, then, the current Court requires Congress to do more by way of fact-finding before it will uphold statutes as valid uses of the Section 5 power. The Court also requires Congress to take more care to limit legislation so as to correspond more closely to the constitutional violations it seeks to address. In essence, the careful review the Court now gives to Section 5 legislation shifts the presumption away from Congress, requiring it, rather than the state, to make out a case for its use of that power.<sup>135</sup> The next part of this Article applies these observations to ENDA in an attempt to determine whether the Court would uphold its applicability to the states as appropriate Section 5 legislation.

## II. GARRETT, ROMER, AND ENDA

At first glance, it might appear that *Board of Trustees of the University of Alabama v. Garrett* sounds the death knell for any authorization

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<sup>131</sup> See *Garrett*, 121 S. Ct. at 963–64.

<sup>132</sup> See, e.g., *id.* at 967 (comparing the Voting Rights Act provisions upheld in *South Carolina*, described as "a detailed but limited remedial scheme" applicable in parts of the country where Congress identified "abundant evidence of States' systematic denial" of constitutional rights, with the ADA, which it described as a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities") (quoting ADA, 42 U.S.C. § 12101(b)(1) (1994)).

<sup>133</sup> See, e.g., *Kimel*, 528 U.S. at 81; *City of Boerne*, 521 U.S. at 518.

<sup>134</sup> See, e.g., *Kimel*, 528 U.S. at 81; *City of Boerne*, 521 U.S. at 536.

<sup>135</sup> Compare Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 477 (2000) (describing the Court's current review of Section 5 legislation as "strict scrutiny"). It is unclear whether such a de facto shift in the burden of proof applies also to legislation targeting discrimination on the basis of criteria the Court always considers suspect, most notably race and gender. The Court has not decided a case considering such a statute in the post-*City of Boerne* period.

in ENDA for state employees to sue their employers for retrospective relief.<sup>136</sup> In both *Kimel v. Florida Board of Regents* and *Garrett*, the Court was quite skeptical of the Section 5 basis for federal legislation benefiting groups that the Court had not previously favored with suspect class status. *Garrett* further suggests that an occasional decision striking down a statute harming a particular group, on the ground that the statute failed the rational basis test, would not be of much help in saving a Section 5-based statute benefiting that group. This latter fact makes it even more doubtful that the Court would find ENDA an appropriate enforcement of the constitutional rights found to be violated in *Romer v. Evans*<sup>137</sup> given that decision's well-known ambiguity.<sup>138</sup>

This part of the Article considers the constitutionality of ENDA as Section 5 legislation. It starts by summarizing ENDA's most important provisions. It then identifies and describes the constitutional violation resulting when a state engages in employment discrimination against gay men and lesbians. The Article then considers whether there is a pattern of such violations and then asks whether ENDA is directly targeted at those violations or, if not, whether it is a congruent and proportional response to them.

### A. ENDA

ENDA's basic provisions are straightforward.<sup>139</sup> ENDA would make it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's sexual orientation."<sup>140</sup> This terminology tracks closely the anti-discrimination language in Title VII of the Civil Rights Act of 1964, which prohibits employment

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<sup>136</sup> Versions of ENDA introduced in the past have clearly intended to bring states within their purview in their capacity as employers. For example, S. 1276, introduced in the 106th Congress, explicitly abrogates state sovereign immunity. Section 13(a) provides for remedies at law to the extent available under Title VII, S. 1276 § 13(b) and defines "employer" to include "a person engaged in an industry affecting commerce (as defined in section 701(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h)) who has 15 or more employees"), S. 1276 § 3(3) (A).

<sup>137</sup> 517 U.S. 620 (1996).

<sup>138</sup> See *infra* notes 160–163 and accompanying text.

<sup>139</sup> S. 1284, 107th Cong. (2001); H.R. 2692, 107th Cong. (2001). Unless noted otherwise, citations in this section are to the House and Senate versions of the bill introduced into the 107th Congress.

<sup>140</sup> S. 1284; H.R. 2692.

discrimination on the basis of race or gender.<sup>141</sup> In an important contrast to Title VII, however, ENDA does not allow an employee to make out a discrimination claim based on an employment practice that has a disparate impact relative to sexual orientation.<sup>142</sup> ENDA explicitly waives state sovereign immunity<sup>143</sup> and provides for retrospective relief, although, importantly, it does not allow for back pay awards as a component of compensatory damages.<sup>144</sup> ENDA also includes a number of other important limitations. In addition to the prohibition on back pay awards, ENDA limits relief by barring courts, as part of a relief order, from ordering quotas or preferential treatment for gays.<sup>145</sup>

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<sup>141</sup> Compare 42 U.S.C. § 2000e-2(a)(1) (2001) (prohibiting same activity when performed because of the employee's race, color, religion, sex, or national origin). A provision in ENDA preventing the classification or segregation of employees so as to deprive them of equal employment opportunities also closely tracks its counterpart provision in Title VII. Compare S. 1284, § 4(a)(2), and H.R. 2692, § 4(a)(2), with 42 U.S.C. § 2000e-2(a)(2).

<sup>142</sup> Compare S. 1284, § 4(f), and H.R. 2692, § 4(f) (both disallowing disparate impact claims), with *Griggs v. Duke Power Co.*, 401 U.S. 424, 432–33 (1971) (reading Title VII as authorizing disparate impact claims).

<sup>143</sup> See S. 1284, § 13(a); H.R. 2692, § 13(a). ENDA also includes a provision deeming “a State’s receipt or use of Federal financial assistance for any program” to constitute a waiver of the state’s Eleventh Amendment immunity from lawsuit for the type of relief provided in the statute. S. 1284, § 13(b)(1)(A); H.R. 2692, § 13(b)(1)(A); see also sources cited *infra* note 144. This provision, presumably designed as an insurance policy against the Supreme Court holding ENDA to have exceeded Congress’ Section 5 power, raises the question of whether ENDA would be an appropriate expression of Congress’ power to place conditions on its grants of financial assistance to the states. That question is beyond the scope of this Article, which focuses instead on the bill’s grounding in Section 5. The framework for this analysis is provided by *South Dakota v. Dole*, 483 U.S. 203 (1987). While *South Dakota*’s exceedingly lenient Spending Clause analysis was joined by seven Justices (Justice O’Connor dissented, see *id.* at 212, and Justice Brennan did not reach the issue, see *id.* (Brennan, J., dissenting)), it is at least possible that the Court’s recent enthusiasm for judicially crafted federalism rules could prompt the Court to re-examine that issue. Indeed, a careful reading of *South Dakota* also suggests that the Court in that case did not definitively decide the contours of the most important factor: the relatedness between the spending condition and the federal interest in the program funded. See *id.* at 207–08 (stating this factor); *id.* at 209 & n.3 (refraining from conclusively establishing the degree of relatedness required); see also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (acknowledging that *South Dakota* also indicated that a federal financial inducement to the states could be so coercive as to constitute unconstitutional compulsion). If the Court does re-examine the scope of the Spending Clause, then ENDA’s Section 5 support would become dispositive. At any rate, there may well be particular state programs that in fact do not receive federal financial assistance, and for which ENDA’s Section 5 authorization would constitute the only support for abrogating state sovereign immunity from claims for retrospective relief.

<sup>144</sup> See S. 1284, § 13(c)(2); H.R. 2692, § 13(c)(2).

<sup>145</sup> See S. 1284, § 8(c); H.R. 2692, § 8(c). ENDA also prohibits employers from adopting or instituting quotas based on sexual orientation. See S. 1284, § 8(a); H.R. 2692, § 8(a).

It "does not apply to the provision of employee benefits to an individual for the benefit of the domestic partner of such individual."<sup>146</sup> ENDA does not apply to religious organizations,<sup>147</sup> the military,<sup>148</sup> or employers employing fewer than fifteen persons.<sup>149</sup> It also allows employers to enforce rules regarding "nonprivate sexual conduct" if such rules apply equally regardless of sexual orientation.<sup>150</sup> Enforcement is analogous to enforcement under Title VII.<sup>151</sup>

### B. *Determining the Fourteenth Amendment Violation*

In order to determine whether ENDA is "appropriate" Section 5 legislation, the first step is to determine the scope of the constitutional violation inhering in state government employment discrimination on the basis of sexual orientation. As the Court in *Garrett* noted, under Section 5 "Congress is not limited to mere legislative repetition of [the Supreme] Court's constitutional jurisprudence,"<sup>152</sup> but instead has the power "both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."<sup>153</sup> The *Garrett* Court continued by noting that "legislation reaching beyond the scope of Section 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"<sup>154</sup>

This statement of the law suggests that different inquiries may be appropriate for legislation that simply repeats the constitutional limits on state action the Court has found inhere in the Fourteenth Amendment and for legislation that prohibits conduct beyond those limits in order to remedy or deter unconstitutional conduct. The first

<sup>146</sup> S. 1284, § 6; H.R. 2692, § 6.

<sup>147</sup> See S. 1284, § 9; H.R. 2692, § 9 ("This Act shall not apply to a religious organization."). Religious organizations are defined to include educational institutions either owned or controlled by religious associations or societies or whose curriculum is directed toward religious propagation. See S. 1284, § 3(8); H.R. 2692, § 3(8). By contrast, Title VII exempts religious organizations (defined similarly as in ENDA) only from its prohibition on religious discrimination. See 42 U.S.C. § 2000e-2(e) (1994).

<sup>148</sup> See S. 1284, § 10; H.R. 2692, § 10.

<sup>149</sup> See S. 1284, § 3(4)(A); H.R. 2692, § 3(4)(A).

<sup>150</sup> See S. 1284, § 11(a); H.R. 2692, § 11(a).

<sup>151</sup> See S. 1284, § 12(a)(1)(A); H.R. 2692, § 12(a)(1)(A).

<sup>152</sup> 121 S. Ct. at 963.

<sup>153</sup> *Id.* (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

<sup>154</sup> 121 S. Ct. at 963 (quoting *City of Boerne*, 521 U.S. at 536).

of these conceptions of the Section 5 power is hardly exceptional. If the Section 5 power means anything, it must mean that Congress has the power to prohibit conduct in general that the Court has found, in a particular case, to violate the Constitution, as well as the power to create remedies for such unconstitutional conduct. The narrowest conception of the Section 5 power must include the power to prohibit as a general rule what the Supreme Court has declared to be unconstitutional in the context of a particular case. Indeed, given the Court's statement in *Cooper v. Aaron* that a principle of constitutional law enunciated by the Supreme Court is itself the "supreme Law of the Land," such a power is close to superfluous.<sup>155</sup> The congressional power to create remedies for such unconstitutional conduct is only slightly broader. This power too must be uncontroversial, as a matter of textual interpretation, if Section 5's explicit grant of power to "enforce" the Fourteenth Amendment is to have any meaning.

Thus, logically the task is simply to determine what sorts of sexual orientation discrimination the Court has already found to violate the Fourteenth Amendment and compare that invidious discrimination to the conduct outlawed in ENDA. Because disability discrimination has a constitutional status quite analogous to discrimination on the basis of sexual orientation, *Garrett* provides a useful guide for how the Court may approach that inquiry.

As with sexual orientation discrimination, the Court has on one occasion, *City of Cleburne v. Cleburne Living Center*, struck down a government action discriminating against the disabled on the ground that it failed the rational basis test.<sup>156</sup> The *Garrett* Court characterized *Cleburne* as a case where the Court simply applied standard rational basis review and struck the action down as reflecting "mere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable* in a zoning proceeding."<sup>157</sup> The Court then noted that in the ADA Con-

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<sup>155</sup> 358 U.S. 1, 18 (1958). Compare, e.g., *id.*, with *Katzenbach v. Morgan*, 384 U.S. 641, 648–49 (1966) ("A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the majestic generalities of § 1 of the Amendment.") (citation omitted).

<sup>156</sup> See generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

<sup>157</sup> 121 S. Ct. at 964 (quoting *Cleburne*, 473 U.S. at 448). The action challenged in *Cleburne* was a city ordinance requiring a special permit for a group home for the mentally disabled but which did not require such a permit for other types of group homes.

gress had failed to provide sufficient evidence that states were engaging in a pattern of discrimination motivated by such negative attitudes, divorced from proper government ends.<sup>158</sup>

Applying this first step of the analysis to the situation posed by sexual orientation discrimination, the challenge will be to characterize the constitutional violation in *Romer*; the one case in which the Court has found anti-gay discrimination to be unconstitutional.<sup>159</sup>

### C. What is the Equal Protection Violation in *Romer*?

Commentators have described Justice Kennedy's opinion in *Romer* in a variety of ways: a reflection of an "anti-caste" principle inherent in the Equal Protection Clause,<sup>160</sup> a gloss on the Bill of Attainder Clause,<sup>161</sup> an example of heightened scrutiny under the more stringent version of the rational basis test,<sup>162</sup> and the first step toward granting homosexuality suspect class status.<sup>163</sup> Assuming that a future Court dealing with a challenge to ENDA would not read into *Romer* the broader, more speculative content suggested by the "anti-caste" theory or the quasi-Bill of Attainder analysis,<sup>164</sup> and assuming further

<sup>158</sup> *Id.* at 964–66.

<sup>159</sup> See generally 517 U.S. 620 (1996).

<sup>160</sup> See generally Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996).

<sup>161</sup> See generally Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996).

<sup>162</sup> See generally, e.g., Roderick M. Hills, *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar's Analysis of Romer*, 95 MICH. L. REV. 236 (1996).

<sup>163</sup> See generally, e.g., Jerald W. Rogers, Note, *Romer v. Evans: Heightened Scrutiny Has Found a Rational Basis—Is The Court Tacitly Recognizing Quasi-Suspect Status for Gays, Lesbians, and Bisexuals?*, 45 U. KAN. L. REV. 953 (1997).

<sup>164</sup> This is not to suggest that such readings are "incorrect," in the sense that they are logically unsupportable, historically inaccurate, or fail to lead to a coherent understanding of the Constitution. It is to suggest, however, that such readings are not the ones most likely to be adopted by the Court if and when it needs to characterize *Romer* when dealing with a future challenge to ENDA. If *Garrett* is any indication, the Court will simply read *Romer* very narrowly (as *Garrett* Court read *Cleburne*). On the other hand, it should be noted that there is at least some difference in the tones of *Cleburne* and *Romer*. While *Cleburne* purported to be a simple application of the rational basis test (though with the unusual result that the statute failed the test), the *Romer* opinion continually notes the uniqueness of Amendment 2 and the harm it does to the equal protection principle. See *Romer*, 517 U.S. 620, 627 (1996) ("Sweeping and comprehensive is the change in legal status effected by [Amendment 2]."); *id.* ("The change that Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching."); *id.* at 629 ("Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government."); *id.* at 632 ("Amendment 2 fails, indeed defies, even th[e] conventional inquiry [required by equal protection, into the relationship between statu-

that it would not use *Romer* as the jumping off point for declaring sexual orientation a suspect classification,<sup>165</sup> the Court would be left with the need simply to take *Romer* at its word, for what it actually said, rather than for what it implied or for what it should logically lead to.<sup>166</sup> Thus, a close reading of *Romer* seems appropriate.

*Romer* considered a challenge to Amendment 2, an amendment to the Colorado Constitution enacted by the people of Colorado in a referendum election in 1992.<sup>167</sup> Amendment 2 stated, in relevant part:

[N]either the State . . . nor any of its . . . subdivisions . . . shall enact . . . or enforce any statute . . . or policy whereby homosexual . . . orientation [or] conduct . . . shall constitute or otherwise be the basis of . . . any protected . . . status or claim of discrimination . . . .<sup>168</sup>

The majority's analysis of this provision was surprisingly terse, taking up little over four pages in the U.S. Reports.<sup>169</sup> The Court cited two

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tory ends and means]. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation."); *id.* at 633 ("Amendment 2 confounds th[e] normal process of judicial review [under the Equal Protection Clause]."); *id.* ("The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."); *id.* ("It is not within our constitutional tradition to enact laws of this sort."). The point, then, is that it is always possible that the Court, in construing *Romer* in the future, may well point to the uniqueness of Amendment 2 as requiring a unique response, for example, the enunciation of an "anti-caste" principle. *See id.* at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else . . . . A State cannot so deem a class of persons a stranger to its laws.").

<sup>165</sup> The classic example of such a progression is in gender, where the Court's first decision striking down a gender classification, *Reed v. Reed*, 404 U.S. 71, 76, 77 (1971), was based on the rational basis standard. Within two years, four members of the Court had argued that gender should be a suspect classification, *see Frontiero v. Richardson*, 411 U.S. 677, 688 (1973), and within five years a majority had accepted intermediate or quasi-suspect status for gender, *see Craig v. Boren*, 429 U.S. 190, 197-99 (1976). The Court, however, has not recognized a new suspect or quasi-suspect class since the 1970s, preferring instead to strike laws down under the rational basis test. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-47 (1985) (refusing to accord suspect class status to the mentally retarded, but striking down a law that burdened that group on the ground that it failed the rational basis test). *But see United States v. Virginia*, 518 U.S. 515, 553 (1996) (using the intermediate scrutiny test to strike down a gender classification, but arguably redefining that test to require more stringent scrutiny).

<sup>166</sup> Compare cases cited *supra* at note 165 and accompanying text (tracing the progression of the Court's treatment of gender classifications).

<sup>167</sup> Details about the referendum, and the course of the *Romer* litigation, can be found in *Rogers*, *supra* note 163, at 954-56.

<sup>168</sup> COLO. CONST. art. II, § 30b, *repealed by Romer*, 517 U.S. 620 (1996).

<sup>169</sup> *See Romer*, 517 U.S. at 631-35.

reasons for striking down Amendment 2. First, it concluded that Amendment 2 "confounds" normal rational basis review.<sup>170</sup> According to the Court, Amendment 2 was different from laws upheld under the rational basis standard because those laws were "narrow enough in scope and grounded in a sufficient factual context for us to ascertain [that there existed] some relation between the classification and the purpose it served," thus ensuring "that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."<sup>171</sup> By contrast, Amendment 2's extreme combination of a group, identified by a single trait, which is then denied protection across the board via a broad-ranging disability,<sup>172</sup> results in the "disqualification of a class of persons from the right to seek specific protection from the law,"<sup>173</sup> making it "in general more difficult for one group of citizens than for all others to seek aid from the government."<sup>174</sup> According to the Court, this sort of broad-based denial of government assistance, based on a single trait, constituted a violation of equal protection in its most literal sense.<sup>175</sup>

The Court's second reason for striking down Amendment 2 was much more prosaic and, perhaps for that reason, easier to express. The Court concluded that the broad-based nature of the disabilities Amendment 2 imposed on gays and lesbians exceeded any legitimate purpose the government might have had, thus leaving animus as the only explanation for its enactment.<sup>176</sup> The Court noted that Colorado defended Amendment 2 as a means of respecting the associational rights of landlords and employers that might object to homosexuality and as a way the state could conserve its resources to fight discrimination against other groups.<sup>177</sup> The Court found these justifications "impossible to credit" given how much further Amendment 2's burdens ran.<sup>178</sup> The Court concluded that Amendment 2 violated a "conventional and venerable" principle of equal protection: Namely, that a

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<sup>170</sup> See *id.* at 633.

<sup>171</sup> *Id.* at 632-33.

<sup>172</sup> See *id.* at 632.

<sup>173</sup> *Id.* at 633; see also *id.* at 626-31 (characterizing the effect of Amendment 2 as an exclusion of homosexuals from the right to equal treatment by the government in a broad variety of contexts).

<sup>174</sup> *Romer*, 517 U.S. at 633.

<sup>175</sup> *Id.* ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

<sup>176</sup> See *id.* at 632.

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*

law must bear a rational relationship to a legitimate government interest.<sup>179</sup>

Leaving aside the more speculative theories about *Romer*,<sup>180</sup> for our purposes the unifying theme in the Court's rationale is the lack of legitimate justification—and thus the irrationality—of the classification given the scope of the burdens Amendment 2 placed on gays and lesbians.<sup>181</sup> The Court's second justification, that Amendment 2 simply failed standard rational basis review, clearly reflects this concern, as the imbalance between Amendment 2's ends and means raised the suspicion that the provision was motivated by another, illegitimate, motivation. The Court's first justification also reflects the concern about legitimate justification, as the Court was simply suspicious that any enactment so broad could serve a legitimate government interest.

Thus, in determining whether ENDA simply targets or provides a remedy for discrimination of the sort condemned in *Romer*, it might be helpful to begin by considering the rationality (in the constitutional sense) of sexual orientation discrimination in state government employment.

#### D. *Is ENDA Targeted at Unconstitutionally Irrational Sexual Orientation Discrimination?*

The strongest argument distinguishing the ADA from ENDA may be that employment discrimination against gays and lesbians is simply irrational in a way that various types of discrimination against the disabled are not. In both *Cleburne* and *Romer*, the Court struck down state action as violating the Equal Protection Clause, even though discrimination against the burdened group—respectively, the mentally disabled and homosexuals—ostensibly received only rational basis scrutiny.<sup>182</sup> In both cases, the Court concluded that the government action was motivated by animus or fear—that is, by reasons that are illegitimate for purposes of the rational basis test, which requires a

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<sup>179</sup> See *Romer*, 517 U.S. at 632.

<sup>180</sup> See *supra* notes 160–165 and accompanying text.

<sup>181</sup> Obviously, this is an extreme over simplification. As will be clear shortly, a major difference between the violation reflected in Amendment 2 and the discrimination outlawed by ENDA is that the former is much broader, stretching across, as the Court described, “an almost limitless number of transaction and endeavors that constitute ordinary civic life in a free society.” *Romer*, 517 U.S. at 631.

<sup>182</sup> See *id.* at 632; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 443, 444 (1985).

rational relationship to a *legitimate* government purpose.<sup>183</sup> In *Garrett*, the Court concluded that a state's refusal to provide the accommodations required by the ADA might not be motivated by such an illegitimate purpose, but instead by a rational (in the Court's words, "hardheaded")<sup>184</sup> desire to save money, as cruel ("hardhearted")<sup>185</sup> as that decision may be. Although left unsaid, the Court's analysis clearly implies that such a refusal to take the steps required by the ADA might be irrational in a broader sense—given either the value disabled workers could produce if provided an accommodation or, even more generally, the net social benefit of making it possible for disabled individuals to work and participate in society.<sup>186</sup> However, the standard rational basis test leaves to the state the balancing of these costs and benefits.

Would the same analysis apply to employment discrimination against gays? In other words, is there a "hardheaded" cost-benefit balancing that would go into a state decision to engage in employment discrimination on the basis of sexual orientation? There does not seem to be, for the obvious reason that a rule of non-discrimination on the basis of sexual orientation would not necessarily require states to spend funds to modify most workplaces to take account of or accommodate differing sexual orientations.<sup>187</sup> The one possible way in which employing gays and lesbians may in fact require extra costs among states would be if other workers' resistance or hostility to the presence of a gay co-worker required the state to shift personnel or otherwise alter the workplace, thereby increasing the state's costs.<sup>188</sup>

Is it otherwise rational to engage in workplace discrimination on the basis of sexual orientation? This is, of course, an important question to ask for the Section 5 analysis. Indeed, it would be dispositive if the answer is "no." The Court in *Garrett* stated that "Section 5 legislation reaching beyond the scope of Section 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be

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<sup>183</sup> See *Romer*, 517 U.S. at 632; *Cleburne*, 473 U.S. at 443–47.

<sup>184</sup> 121 S. Ct. at 964.

<sup>185</sup> *Id.*

<sup>186</sup> Indeed, Congress made a finding to this effect. See 42 U.S.C. § 12101(a)(9) (1994) ("[T]he continuing existence of unfair and unnecessary discrimination [against people with disabilities] . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.").

<sup>187</sup> Although the military is a possible exception, ENDA is inapplicable to the military. See *infra* note 229 and accompanying text.

<sup>188</sup> See *infra* notes 206–211 and accompanying text.

prevented or remedied and the means adopted to that end.”<sup>189</sup> Thus, congruence and proportionality seem to be unnecessary if the legislation directly aims at actual Fourteenth Amendment violations.<sup>190</sup> This Article now considers whether sexual orientation discrimination of the type prohibited in ENDA can ever be rational.

### 1. Status and Conduct, “Don’t Ask, Don’t Tell” and *Bowers v. Hardwick*

Perhaps surprisingly, relatively few courts have considered the constitutionality of government employment discrimination against gays and lesbians, at least outside of the realm of discharges from military service. Some employment dismissals are defended on the theory that the plaintiff’s expression of her sexual orientation, or her acting in a way consistent with it (say, by participating in a same-sex marriage ceremony), constituted disruptive conduct that justified the dismissal completely apart from the plaintiff’s sexual orientation.<sup>191</sup> Relatedly, in cases dealing with law enforcement jobs or those involving security clearances, courts have held that government has the power to exclude on the basis of whether the individual has violated the law or lied when asked about his sexual orientation.<sup>192</sup> Strictly speaking, these cases are not relevant to the question of whether sexual orientation itself—as a status, divorced from conduct—is a constitutionally permissible ground for firing or not hiring someone. They do, however, thereby raise a subsidiary question: To what extent is sexual orientation relevant in that homosexual or bisexual orientation allows the government rationally to presume homosexual conduct?<sup>193</sup> A state

<sup>189</sup> 121 S. Ct. at 963 (citing *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

<sup>190</sup> This, of course, is not surprising; such legislation would be doing nothing more than prohibiting legislatively the sort of conduct that the Court has already held to be a violation of the Constitution. See *supra* note 155 and accompanying text.

<sup>191</sup> See generally, e.g., *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (upholding dismissal of lesbian from attorney general’s office because of certain conduct, including her participation in a same-sex marriage ceremony, which the Attorney General thought might affect the efficiency of the office’s performance). These cases raise complicated issues of free speech and association law. For an examination of these issues in the employment context, see generally Marvin Hill & Emily Delacenseri, *Procrustean Beds and Draconian Choices: Lifestyle Regulations, and Officious Intermeddlers – Bosses, Workers, Courts and Labor Arbitrators*, 57 Mo. L. Rev. 51 (1992); see also *id.* at 140, 141 (summarizing caselaw and suggesting appropriate rules).

<sup>192</sup> See generally, e.g., *Doe v. Gates*, 981 F.2d 1316 (D.C. Cir. 1993) (involving an employee who lied to the CIA about his sexual orientation); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (citing problem that would arise with a law enforcement officer potentially engaging in illegal conduct).

<sup>193</sup> Very often courts have simply presumed that a person’s homosexual orientation indicates a likelihood that she will engage in homosexual sex. See, e.g., *Ben-Shalom v. Marsh*,

whose law criminalizes sodomy might well argue that it is rational for it to engage in employment discrimination against homosexuals because they have a propensity for violating the law, even though such a classification might be seriously under or over inclusive.<sup>194</sup>

The main battleground on which this status versus conduct argument has been played out has been the military under the "Don't Ask, Don't Tell" policy.<sup>195</sup> Under that policy, the military can discharge anyone who engages in homosexual acts or who states that they are gay or lesbian unless they can prove that they do not have a propensity to engage in homosexual acts.<sup>196</sup> Thus, while seemingly only proscribing conduct (engaging in homosexual acts or having a propensity to do so), the policy, according to some commentators, effectively proscribes status since it is relatively easy for the military to argue that the status of being homosexual indicates a propensity to engage in homosexual acts.<sup>197</sup> This logic has led courts to uphold the policy.<sup>198</sup>

If the Court were to follow such a path with regard to ENDA, it might well strike the statute down as going beyond unconstitutional sexual orientation discrimination on the ground that a state would have a rational reason to discriminate on the basis of sexual orientation to the extent that sexual orientation indicated a propensity to violate the law, that is, to commit a sex crime.<sup>199</sup> While a propensity to

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881 F.2d 454, 464 (7th Cir. 1989). The presumption that homosexual orientation infers homosexual conduct is, of course, the underlying principle of the military's current "Don't Ask, Don't Tell" policy. See Diane H. Mazur, *Word Games, War Games*, 98 MICH. L. REV. 1590, 1598-1600 (2000) (reviewing JANET E. HALLEY, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* (1999)).

<sup>194</sup> See, e.g., Michele L. Booth, *Shahar v. Bowers: Is Public Opinion Transformed into a Legitimate Government Interest When Government Acts as Employer?*, 78 B.U. L. REV. 1235, 1260 (1998) (citing evidence that common sexual activities between lesbians are often not prohibited by sodomy laws); *id.* at 1262 (citing evidence that most heterosexuals have engaged in illegal sexual activities).

<sup>195</sup> 10 U.S.C. § 654 (1994).

<sup>196</sup> See Mazur, *supra* note 193, at 1595.

<sup>197</sup> See, e.g., *id.* at 1598-1600.

<sup>198</sup> See, e.g., *Able v. United States*, 88 F.3d 1280, 1298 (2d Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 929 (4th Cir. 1996) (en banc); *Hoffman v. United States*, 1997 WL 136418, \*3 (E.D. Pa. 1997); see also, e.g., *Steffan v. Perry*, 41 F.3d 677, 688-93 (D.C. Cir. 1994) (upholding, under pre-"Don't Ask, Don't Tell" policy, a dismissal of a midshipman at the Naval Academy because of his statement that he was a homosexual on the ground that his statement of homosexual orientation provided a rational basis for the military to presume that he was likely to engage in homosexual conduct). See generally, e.g., *Thorne v. Dep't. of Def.*, 945 F. Supp. 924 (E.D. Va. 1996).

<sup>199</sup> See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a state law criminalizing sodomy). However, in that case the Supreme Court dealt only with the argument

violate the law might be more relevant to some state jobs than others—for example, more relevant to a state trooper position than to a clerical one—a state's desire to have law-abiding employees presumably would be considered legitimate. Nevertheless, it should not be taken for granted that a sexual orientation job criterion would be sufficiently linked to that goal as to survive rational basis scrutiny.<sup>200</sup> To the extent that state sex crime laws simply prohibit certain types of sex, regardless of the gender of those engaged in it, there is evidence that heterosexuals engage in such illegal sexual conduct at least as frequently as homosexuals.<sup>201</sup>

Given cases upholding classifications with only the most tenuous relation to legitimate interests,<sup>202</sup> the Court would have to apply a more stringent type of rational basis review in order to strike down such a statute on this theory. On the other hand, to the extent that a state's sex crimes law prohibits such conduct only when engaged in between two persons of the same sex, such a prohibition may itself be constitutionally problematic as a matter of equal protection.<sup>203</sup> Without a rational reason for singling out gays and lesbians, *Romer* provides at least some hope that the current Court would strike such legislation down, or at least not credit it as providing a state with a legitimate justification for discriminating against gays and lesbians in employment.

Thus, a state may not have a good argument that it should be able to engage in sexual orientation-based employment discrimination because sexual orientation is a marker for a propensity to engage in illegal conduct that the state can constitutionally seek to prevent in its workforce. Nevertheless, *Hardwick* remains a hurdle, requiring the Court not only to disentangle the concepts of status and conduct, but to decouple the two by refusing to credit the argument that sexual

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based in substantive due process, namely, as framed by the majority, the argument that the right to privacy found in the due process clause included the right to engage in homosexual sodomy. *See id.* at 190, 191. It explicitly refrained from considering the equal protection issue. *See id.* at 196 n.8.

<sup>200</sup> This issue would not arise at all in a state that did not have a sodomy law.

<sup>201</sup> *See* sources cited *infra* note 287.

<sup>202</sup> *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) (upholding California's Proposition 13 property tax statute based, in part, on the relationship between differential tax treatment of newly acquired and long-held property on a possible state interest in neighborhood stability); *Ry. Express Agency v. New York*, 336 U.S. 106, 109–10 (1949) (upholding differential treatment of truck signage advertising the truck owner's own products and signage rented out to third parties based on the possible safety differences traffic experts may have discerned between them).

<sup>203</sup> *See supra* note 199 and accompanying text.

orientation is a legally sufficient marker for same-sex conduct.<sup>204</sup> It is, however, exactly that sort of careful analysis that would require the Court to engage in a more searching review than suggested by the standard rational basis test.<sup>205</sup> To the extent that such unusually searching "rational basis" review is necessary, it might militate against the Court's willingness to hold that sexual orientation employment discrimination is irrational.

## 2. Pure Status Arguments

On the other hand, some courts have focused their analysis squarely on the question whether sexual orientation discrimination in employment is constitutional. For example, in *Weaver v. Nebo School District*,<sup>206</sup> a federal district court granted summary judgment to a lesbian high school teacher/athletic coach who was removed as a coach after she disclosed her orientation in response to a student's question and thus according to school officials, caused controversy. The court explicitly rejected as insufficient grounds for the school's action the community's supposed negative response to her disclosure, "[i]f the community's perception is based on nothing more than unsupported assumptions, outdated stereotypes, and animosity."<sup>207</sup> According to the court, the only appropriate justification for removing the plaintiff would have been one related to her job performance.<sup>208</sup>

If community dislike is an inappropriate ground for employment discrimination, presumably it would be insufficient for a state to justify employment discrimination on the ground that co-workers would resist or be hostile to a gay or lesbian colleague. In both situations, the employer would have to incur costs in order to ensure a smoothly

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<sup>204</sup> For a discussion of the relationship between status and conduct in the context of sexual orientation, see, for example, Jay Michaelson, *On Listening to the Kulturkampf, or How America Overruled Bowers v. Hardwick Even Though Romer v. Evans Didn't*, 49 DUKE L.J. 1559, 1576-80 (2000); Anne B. Goldstein, *Reasoning About Homosexuality: A Commentary on Janet Halley's Reasoning about Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1781, 1790-94 (1993).

<sup>205</sup> Other commentators have noted the difficulty *Hardwick* presents for gay rights advocates, even when they litigate issues unrelated to due process. See, e.g., Mary C. Dunlap, *Gay Men and Lesbians Down By Law in the 1990's USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE U. L. REV. 1, 17-24 (1994); see also Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1587 (1993) (noting that historically, sodomy's criminalization assisted in the oppression of gays and lesbians in areas such as government employment).

<sup>206</sup> 29 F. Supp. 2d 1279 (D. Utah 1998).

<sup>207</sup> *Id.* at 1289.

<sup>208</sup> *Id.*

functioning workplace: In *Weaver*, the school would have to spend time, and perhaps money, in responding to parental complaints, educating both parents and students, and generally calming the situation and ensuring physical safety. This is exactly what the state as employer would have to do if the complaining or resisting parties were co-workers.<sup>209</sup> If such costs, or the general tension caused by the mixture of gay and homophobic individuals, are not considered rational reasons to allow the state to discriminate in *Weaver*, they should not be considered any different when the complaining or resisting parties are co-workers. Thus, assuming that there is no other "hardheaded" reason for discriminating against a lesbian or gay person, and further assuming that the removal was not for reasons of conduct as opposed to mere orientation,<sup>210</sup> there would appear to be no room for morality-based community disapproval to justify discrimination.<sup>211</sup>

It should be noted that this argument does not deny the more general role of morality in law. Indeed, as a doctrinal matter, the Supreme Court in *Hardwick* made it clear that morality is a constitutionally appropriate justification for prohibitions on at least some conduct.<sup>212</sup> But, decisions such as *Weaver* suggest that morality cannot

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<sup>209</sup> See generally *id.* at 1279.

<sup>210</sup> Compare, e.g., *Shahar v. Bowers*, 114 F.3d 1097, 1106–08 (11th Cir. 1997) (upholding dismissal of lesbian from attorney general's office because of certain conduct, including her participation in a same-sex marriage ceremony, that the Attorney General thought might affect the office's performance), with *Padula v. Webster*, 822 F.2d 97, 102, 104 (D.C. Cir. 1987) (concluding that the FBI could rationally refuse to hire a lesbian candidate because her sexual orientation suggested a propensity to engage in conduct that might be illegal in areas in which she would be operating as a law enforcement officer). But see sources cited *infra* note 287 (citing studies suggesting the under- and over-inclusiveness of *Padula's* rationale).

<sup>211</sup> See *Weaver*, 29 F. Supp. 2d at 1289. For other examples of similar reasoning outside the potentially special context of the military, see *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (holding that school officials had no rational basis for failing to protect a high school student from harassment based on his sexual orientation); *Jantz v. Muci*, 759 F. Supp. 1543, 1548–52 (D. Kan. 1991) (holding both that sexual orientation is an inherently suspect classification and that employment discrimination against homosexuals is irrational in contexts where there is no issue of security clearances or special risk if the employee engages in illegal action), *rev'd on other grounds*, 976 F.2d 623, 627–30 (10th Cir. 1992) (holding that rule against sexual orientation discrimination in government employment was not well settled when the offending conduct occurred and that defendants were entitled to qualified immunity); see also *Woodard v. Gallagher*, 1992 WL 252279, \*3 (Fla. Cir. Ct. 1992) (concluding that sexual orientation should receive heightened rational basis scrutiny but deciding case on other grounds).

<sup>212</sup> See 478 U.S. 186, 196 (1986); see also *Barnes v. Glen Theater*, 501 U.S. 560, 572, 575 (1991) (Scalia, J., concurring in the judgment) (concluding that a ban on public nudity was constitutionally valid because of government's power to enforce good morals). But see *id.* at 570 (plurality opinion); *id.* at 582 (Souter, J., concurring); *id.* at 590, 591 (White, J.,

serve as a rational basis justifying different treatment of groups based on status such as sexual orientation. Indeed, combining *Hardwick* and *Romer* seems to require that conclusion. In *Hardwick* the Court explicitly stated that morality may be a valid government interest for banning certain conduct,<sup>213</sup> while *Romer* held Amendment 2 unconstitutional in part because it concluded that it was based on animus toward homosexuals.<sup>214</sup> But even if harmonizing *Hardwick* and *Romer* does not require this conclusion, it nevertheless surely seems a reasonable reading of the Equal Protection Clause, especially in light of other cases prohibiting the criminalization of statuses some of whose characteristic conduct can be proscribed.<sup>215</sup> And if such a conclusion seems reasonable, then there is all the more reason to view ENDA as a confirmation of the equal protection guarantee, rather than a rewriting of it.<sup>216</sup>

### 3. The Significance of ENDA's Limits

#### a. *Reading Romer as Unique*

The problem with the foregoing analysis is that the Court may simply cut it off by pointing to the uniqueness of the burdens Amendment 2 placed on gays and lesbians. Certainly there are sufficient references in *Romer* to Amendment 2's novelty to allow the Court to distinguish it from more targeted discrimination prohibited in ENDA.<sup>217</sup> Amendment 2's uniqueness affected the *Romer* Court's analysis in two very different ways. The Court's first rationale for striking down Amendment 2 did in fact focus on the law's uniqueness, as

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dissenting) (resting their analyses on the degree to which nude dancing enjoyed First Amendment protection and on the weight of the non-morality based justifications offered for the statute).

<sup>213</sup> See 478 U.S. at 196.

<sup>214</sup> See 517 U.S. 620, 635 (1996); see also *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 964 (2001) (reading *Cleburne* as concluding that the government action was based on prejudice and thus was unconstitutional); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–50 (1985) (concluding that the government action was based on prejudice and thus was unconstitutional).

<sup>215</sup> Compare, e.g., *Robinson v. California*, 370 U.S. 660, 667, 668 (1962) (striking down a law criminalizing the status of being a drug addict).

<sup>216</sup> Compare generally *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down RFRA on the grounds that it essentially overturned the Court's decision in *Smith*); see also *infra* notes 327–340 and accompanying text (suggesting a broader scope for congressional enforcement of the Equal Protection Clause, as compared with the other provisions of the Fourteenth Amendment).

<sup>217</sup> See *supra* note 164 and accompanying text.

the Court held that Amendment 2's very breadth constituted a literal violation of the equal protection guarantee.<sup>218</sup> However, *Romer's* second rationale was much more prosaic: The Court held that the law simply lacked a rational link to any legitimate justification.<sup>219</sup> Of course that lack of linkage was suggested by Amendment 2's unique breadth; nevertheless, the principle underlying the Court's second rationale was, as the Court noted, "conventional and venerable."<sup>220</sup>

It cannot seriously be argued that employment discrimination is a burden so broad as to constitute a literal violation of equal protection as was Amendment 2. Thus, in order for *Romer* to support the proposition that sexual orientation-based employment discrimination is constitutionally irrational, it may be necessary to make the more conventional argument that the sexual orientation-based employment discrimination prohibited in ENDA simply fails the standard rational basis test. Much of this argument has been made above;<sup>221</sup> however, one piece remains. This sub-part of the argument considers the limits on ENDA's anti-discrimination rule and examines whether those limits succeed in narrowing its scope to government conduct that is most arguably unconstitutional.

#### b. ENDA's Limitations

Several provisions of ENDA limit the scope of its prohibition on sexual orientation-based employment discrimination. First, ENDA makes proving sexual orientation discrimination harder than proving discrimination based on other criteria by providing that disparate impact is insufficient to make out a claim of discrimination.<sup>222</sup> Not only does this limitation make it harder to prove an ENDA claim than, say, a Title VII-based claim,<sup>223</sup> but, more importantly, it links ENDA to the intent requirement of the Equal Protection Clause.<sup>224</sup> Even more, making mere disparate impact insufficient makes successful ENDA claims more reflective of the Court's concern in *Romer*—namely, that

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<sup>218</sup> See *Romer*, 517 U.S. at 626, 627.

<sup>219</sup> See *id.* at 631, 635.

<sup>220</sup> *Id.* at 635.

<sup>221</sup> See *supra* notes 182–216 and accompanying text.

<sup>222</sup> Compare S. 1284, 107th Cong. §4(f) (2001), and H.R. 2692, 107th Cong. §4(f) (2001), with BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 81–114 (1996) (describing adverse impact claims under Title VII).

<sup>223</sup> See *id.*

<sup>224</sup> See *Washington v. Davis*, 426 U.S. 229, 243 (1976) (requiring discriminatory intent before an equal protection violation can be made out).

Amendment 2 was motivated by animus, a conscious desire to burden a person based on a particular trait. Thus, while tying the ENDA standard to the violation in *Romer* makes an ENDA claim harder to prove, the claims that do survive are more likely to reflect the unconstitutional animus that underlay the constitutional problem in *Romer*.<sup>225</sup>

Second, ENDA excludes from its purview any claim relating to provision of benefits for spouses or unmarried partners.<sup>226</sup> Without this provision, such a claim (whether ultimately successful or not) would flow naturally from a general prohibition against sexual orientation discrimination, since states generally provide benefits only for spouses and children, and since no state recognizes same-sex marriages. By excluding such claims, ENDA focuses more narrowly on employment discrimination concerns completely divorced from any state interest in limiting marriage (or the benefits thereof) to heterosexual couples. The point here is that, unless courts are willing to interpret federal equal protection guarantees as requiring states to make marriage available to same-sex couples, the limiting of marriage to opposite-sex couples will be held, by hypothesis, constitutionally rational.<sup>227</sup> If so, then job-related sexual orientation discrimination could also be considered rational if it is justified as a way of preventing gay employees from demanding, as a component of workplace equality, job-related benefits for their partners that "undermine" the special status states accord the marriage relationships the state has reserved for opposite-sex couples. By excluding that issue from its purview, ENDA focuses on the aspect of state conduct—discrimination in the simple act of employment, unrelated to spousal benefits—that does not implicate the state's interests with regard to marriage.<sup>228</sup>

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<sup>225</sup> If it is true that strict scrutiny is reserved for classifications that the Court believes are rarely relevant to legitimate government interests, it makes doctrinal sense to limit sexual orientation discrimination as a Section 5 matter to intentional discrimination. While disparate impact on the basis of a ground like race does not by itself call for strict scrutiny, *see, e.g., id.* at 242, the fact that race is so disfavored as a classification tool might make it justifiable to consider disparate impact stronger evidence of animus in that area, as opposed to sexual orientation. At least, this would be consistent with the relegation of sexual orientation to rational basis review. *Compare, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) ("[D]ifficult and intractable problems often require powerful remedies, and we have never held that Section 5 precludes Congress from enacting reasonably prophylactic legislation.").

<sup>226</sup> *See, e.g., S. 1284*, § 6, 107th Cong. (2001); *S. 1276*, § 6, 106th Cong. (1999).

<sup>227</sup> This is not to comment on the correctness of such a holding. It is, instead, to view ENDA within the fabric of the law as it is likely to exist for at least the near future.

<sup>228</sup> The Vermont Supreme Court, of course, has ruled that the state constitution's "common benefits" clause requires that at least some version of marriage and its benefits be made available to same-sex couples. *See generally Baker v. State*, 744 A.2d 864, 886 (Vt.

Third, other provisions of ENDA, while not directly applicable to states, underscore its overall limited nature. First, ENDA has no application to the military, thus exempting the institution that, because of its uniqueness, presents a different argument for excluding gays and lesbians.<sup>229</sup> Second, the statute exempts businesses with fewer than fifteen employees.<sup>230</sup> Finally, the statute exempts religious organizations. These latter two limitations reflect a respect for free association and free exercise values embodied in the First Amendment when those values might be most threatened by a non-discrimination rule.<sup>231</sup> While a state would not fall under the "small employer" exception and while Establishment Clause concerns presumably mean that a state would not be affected by the exemption for religious organizations,<sup>232</sup> these exemptions reflect again the bill's concern for targeting

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1999). This has led to the now well-known Vermont institution of "civil union." VT. STAT. ANN. tit. 15, Ch. 1 §§ 4 & 8, h. 23, §§ 1201–1207 (Supp. 2000). Still, the fact remains that Vermont is alone in recognizing such a relationship; moreover, other states have taken affirmative steps to refuse to recognize same-sex relationships that other jurisdictions may have legally recognized. See Nancy J. Feather, *Defense of Marriage Acts: An Analysis Under State Constitutional Law*, 70 TEMP. L. REV. 1017, 1019–21, 1033 (1997). Regardless of the ultimate constitutional fate of such refusals, complete equality for same-sex relationships is unlikely in the near future. Thus, ENDA confronts a legal landscape that will continue to feature official privileging of opposite-sex relationships. In turn, this reality will require ENDA, as a measure to remedy and ensure constitutional rights as currently understood, to be consistent with this privileging.

<sup>229</sup> This is not to suggest that the argument is sufficient; instead, it simply acknowledges the reality that the military presents a different and more difficult case for sexual orientation discrimination when compared with other, more ordinary, workplaces.

<sup>230</sup> See, e.g., S. 869, 105th Cong. § 3(3) (1997); H.R. 1858, 105th Cong. § 3(3) (1997).

<sup>231</sup> The importance of a Section 5 enactment not infringing on other constitutional rights derives, at least indirectly, from the *Morgan* Court's insistence, in response to Justice Harlan's dissent in that case, that its broad reading of Congress' Section 5 authority did not empower Congress to draft legislation limiting Fourteenth Amendment rights. Compare 384 U.S. 641, 651 n.10 (1966) (majority opinion), with *id.* at 668 (Harlan, J., dissenting). Specifically, the *Morgan* Court rejected the argument that the challenged statute itself violated the Equal Protection Clause by invidiously discriminating among non-English instructed individuals, favorably treating those educated in Puerto Rican schools and disfavoring those educated in non-American flag schools. *Id.* at 657. The Court rejected this argument because it characterized the statute as a reform measure that sought to increase voting rights. *Id.* However, the Court left open the possibility that there might be an equal protection problem with a state literacy law that classified between graduates of American-flag and foreign schools. See *id.*; see also Ruth Colker, *The Section Five Quagmire*, 47 U.C.L.A. L. REV. 653, 676–77 (2000) (discussing this aspect of *Morgan*). This is not to suggest that ENDA presents a serious risk of infringing anyone's rights. The point, instead, is simply to note that ENDA can be conceived of as a statute of limited scope (and thus "appropriate" Section 5 legislation), its limitations marked in part by the borders of other constitutional rights that it respects.

<sup>232</sup> Proposed increases in the scope of government assistance for faith-based organizations, to the extent they survive constitutional challenge and are implemented by the

only that conduct that society considers so worthless as to be irrational. Indeed, these exceptions tie in closely to the justifications Colorado offered in defense of Amendment 2, justifications that, while the Court did not believe (because Amendment 2 went so much further), the Court never said were illegitimate.<sup>233</sup>

Taken together, ENDA's limitations narrow the class of prohibited conduct to that which is most arguably unconstitutional. The disallowance of disparate impact claims focuses the statute on conduct that is purposely directed at gays and lesbians and thus most likely to be motivated by unconstitutional animus. The other limitations exclude from ENDA's purview situations where such purposeful discrimination might be constitutional, either because the state might be thought to have a legitimate interest (limiting its recognition of committed relationships to heterosexual marriages or, in the case of the federal government, recognizing the special needs of the military<sup>234</sup>) or because a competing private interest has some constitutional stature (such as free religious exercise or a right to associate).

#### *E. Going Beyond Actual Violations: ENDA as Remedial or Prophylactic Legislation*

Assuming, however, that ENDA does not prohibit only conduct that is unconstitutional—in other words, assuming that states sometimes constitutionally engage in the type of employment discrimina-

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states, may nevertheless raise some issue here. The example would be a state that provides assistance to a faith-based organization, whose sexual orientation discrimination then somehow becomes state action (the "somehow" alluding to the difficulty that would inhere in conceiving of the state as the actor for this purpose, but not when the organization actually goes out and acts in a religious way). In such a convoluted and potentially internally contradictory situation, ENDA's religious exemption would inure to the benefit of states. For an example of a fact pattern that comes close (though not precisely on point), see *Employment Discrimination Against Gays & Lesbians*, [http://www.religioustolerance.org/hom\\_empl.htm](http://www.religioustolerance.org/hom_empl.htm) (last modified May 12, 2000) (detailing case of state-funded faith-based charity allegedly discriminating on the basis of sexual orientation).

<sup>233</sup> See *supra* note 177 and accompanying text; *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>234</sup> Again, the fact that the party's whose interests are being considered, here, the federal government, is not subject to the Fourteenth Amendment means that this argument provides only indirect support for the proposition that ENDA is targeted at conduct that violates that Amendment. That indirect support, though, is significant, as it reflects the bill's overall concern for not intruding on other valid interests. Compare *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (concluding that RFRA is not proportional to any Free Exercise Clause violations committed by the states, in part because the statute works a "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens").

tion ENDA prohibits—the inquiry shifts to whether the statute is a congruent and proportional response to conduct that is in fact unconstitutional. Even under the Court’s newer, stricter test for Section 5 legislation, the Court has continued to accept the appropriateness of legislation that bans a “broader swath” of conduct than that actually prohibited by the Constitution in order to deter violations of the constitutional rule.<sup>235</sup> To determine whether such broader legislation represents an appropriate remedy or deterrent, the Court examines whether, first, the legislation is a congruent and proportional response to those violations and, second, whether there is a pattern and practice of such violations that may have evaded the Court’s own eyes.<sup>236</sup>

### 1. Is ENDA Congruent and Proportional?

Under the Court’s post-*City of Boerne v. Flores* jurisprudence, congruence and proportionality require that there be some relationship between the statute justified under the Section 5 power and the underlying constitutional violation. While this concept is not particularly novel,<sup>237</sup> cases starting with *City of Boerne* have required a tighter fit between the statute and the violation.<sup>238</sup> In *Kimel*, *Florida Prepaid v. College Savings Bank*, and *Garrett*, the Court struck down the statutes because they swept too broadly in relation to the constitutional violation that Congress was assertedly enforcing, prohibiting too much state conduct that was in fact constitutional without a showing that states were engaging in significant amounts of unconstitutional conduct.<sup>239</sup> In two of the modern cases, the Court contrasted the statutes at issue with provisions of the Voting Rights Act that were upheld because of their limited scope in *South Carolina v. Katzenbach*.<sup>240</sup> These modern

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<sup>235</sup> See *supra* note 133 and accompanying text.

<sup>236</sup> See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82–91 (2000) (applying the “congruence and proportionality” test, followed by a consideration of whether Congress found the existence of a more serious constitutional problem than perceived by the Court).

<sup>237</sup> See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 650, 651 (1996) (laying out general principles for evaluating the appropriateness of legislation justified under Section 5).

<sup>238</sup> See Post & Siegel, *supra* note 135, at 477 (finding parallels between the Court’s recent Section 5 jurisprudence and strict scrutiny).

<sup>239</sup> See *supra* note 8 and accompanying text.

<sup>240</sup> See *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 967 (2001); *City of Boerne v. Flores*, 521 U.S. 507, 532–33 (1997). The *City of Boerne* Court wrote:

This is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions, or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort

cases stand in stark contrast to the deferential standard of review enunciated in *Katzenbach v. Morgan*, which approached rational basis at least in form and perhaps also in application.<sup>241</sup>

Is ENDA sufficiently closely related to unconstitutional sexual orientation-based employment discrimination so as to survive this test? In part the answer to this question must derive from the earlier question, whether the discrimination prohibited by ENDA can ever be considered constitutionally rational. If it cannot, that is, if such discrimination is always so irrational as to violate the Equal Protection Clause, then there is perfect congruence between ENDA and the constitutional violations Congress has the power to prevent under even the narrowest reading of Section 5.<sup>242</sup> As discussed above, however, it is at least possible that the Court would read *Romer* sufficiently narrowly (as a holding dictated by the unusually broad scope of Amendment 2)<sup>243</sup> and ENDA's prohibitions sufficiently broadly as to conclude that ENDA did not simply prohibit conduct the Court would itself consider violations of equal protection.<sup>244</sup> Thus, this Article now considers ENDA as prophylactic legislation going beyond the actual equal protection guarantee and thereby subject to the congruence and proportionality test.

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to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5.

*City of Boerne*, 521 U.S. at 533.

<sup>241</sup> See 384 U.S. at 653 ("It is not for us to review the congressional resolution of the factors [leading Congress to conclude that § 4(e) of the Voting Rights Act was necessary to secure the equal protection rights of Puerto Ricans in the United States]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."). *Morgan* applied this same deferential standard to congressional determinations of the *substance* of the rights guaranteed by the Fourteenth Amendment. The *Morgan* court wrote:

Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

See *id.* at 656.

<sup>242</sup> See *supra* note 155 and accompanying text.

<sup>243</sup> See *supra* note 164 and accompanying text.

<sup>244</sup> Compare *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86–89 (2000) (describing the breadth of the ADEA and the narrowness of its exceptions as evidence of its lack of proportionality compared with the relatively insignificant constitutional problem it sought to address).

Most of the ENDA limitations relevant to the congruence and proportionality inquiry have already been discussed above, in the discussion whether ENDA is limited to prohibiting constitutionally irrational government employment discrimination.<sup>245</sup> It should be unsurprising that the same factors are relevant to both inquiries: Even if ENDA's limitations do not exactly track the conduct that the Court would find unconstitutional, those limits would still support an argument that ENDA was carefully tailored so as to remain proportionate to the constitutional violations it sought to remedy. As noted above, the most important of these limits are the prohibition on disparate impact claims and on claims for spousal benefits for same-sex partners. Also significant, if indirectly, are the exemptions for the military, religious organizations, and small employers. Taken together, these limits restrict ENDA's scope to situations that are quite arguably consistently unconstitutional. But even if ENDA, so limited, continues to prohibit conduct the Court would find constitutional, these limits significantly restrict ENDA's scope and focus it much more closely on unconstitutional conduct.

In addition to the limits discussed above, two other provisions of ENDA further limit its scope and are especially relevant to the congruence and proportionality inquiry. First, ENDA explicitly refrains from handicapping employers' enforcement of general codes of sexual conduct that are designed and implemented in a sexual orientation-neutral fashion.<sup>246</sup> This provision limits ENDA's scope by exempting situations where the employer might claim that the adverse employment action was based on sexual conduct, not sexual orientation. By allowing at least some sexual conduct to serve as the basis for an adverse employment action, the exemption goes some distance toward cabining ENDA to cases of pure orientation. This, in turn, keeps the statute responsive (or congruent) to the status/conduct distinction created by the combination of *Romer* and *Hardwick*.

Obviously, this provision does not completely track the status/conduct distinction: For a state employer to cite sexual misconduct as the reason for an adverse employment decision, the misconduct must be nonprivate and based on sexual orientation-neutral grounds. Thus, for example, ENDA would still prohibit a state from firing an employee because she had sex with her female partner in the privacy of their home. Indeed, ENDA also would still prohibit a

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<sup>245</sup> See *supra* notes 222–234 and accompanying text.

<sup>246</sup> See, e.g., S. 1276, 106th Cong. § 11 (1999).

state from firing an employee because the state had a sodomy law restricted to homosexual conduct, since the sexual conduct rule would not be orientation neutral. Thus, the sexual misconduct exemption does not give states complete freedom to cite conduct as the reason for the dismissal. For that reason, the exemption may limit states more than the Constitution (as interpreted in *Hardwick*) does.<sup>247</sup> Still, the exemption serves to keep the statute focused on irrational status-based discrimination and thus proportional to the underlying constitutional violation.

Second, ENDA prohibits affirmative action, quotas, or preferential treatment on the basis of sexual orientation, whether imposed by an employer or a court as part of an order or consent decree.<sup>248</sup> While this provision may be a politically savvy response to the argument that anti-discrimination laws confer "special rights,"<sup>249</sup> the legal effect of this provision is to prevent a well-meaning employer or court from responding to discrimination by ordering or implementing a remedy that outruns the original statutory violation.<sup>250</sup> Thus, not only are ENDA's limits closely tied to the prohibitions of the Equal Protection Clause, but in turn, implementation of those limits is closely tied to what the statute requires and goes no further.

In sum, several arguments converge to present a plausible argument that ENDA survives the congruence and proportionality test. First, much garden-variety sexual orientation-based employment discrimination has to be considered irrational. Second, ENDA limits its prohibitions to those instances where there is purposeful discrimination against homosexuals and thus a greater likelihood of unconstitutional animus. Third, ENDA limits its scope when it confronts areas where either the state has a potentially legitimate interest (such as "protecting" heterosexual marriage or discouraging certain conduct) or, more indirectly relevant, where private parties may have constitutionally cognizable countervailing interests. Fourth, the statute pro-

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<sup>247</sup> Compare *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (approving of morality as a legitimate reason to ban homosexual sodomy).

<sup>248</sup> See, e.g., S. 1276, 106th Cong. § 12(d) (1999) (affirmative action prohibition); S. 1276, 106th Cong. § 8 (1999) (quota and preferential treatment prohibitions).

<sup>249</sup> See, e.g., EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS* 102-10 (1999) (discussing polling data from Colorado in the period leading up to the vote on Amendment 2).

<sup>250</sup> Normally, courts' equitable power is broad-ranging and includes the power to enter and monitor compliance with consent decrees that require the parties to do more than what the underlying law requires. See, e.g., *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992).

hibits employer or judicial remedies from outrunning the underlying constitutional violation. If a statute may be congruent to constitutional violations in an area the Court itself has not heavily involved itself in, ENDA seems to be it.

## 2. Have States Engaged in a Pattern and Practice of Unconstitutional Employment Discrimination Against Gays and Lesbians?

In determining whether a pattern and practice of conduct exists, thus making remedial or prophylactic legislation appropriate Section 5 legislation, the current doctrine demands (1) a pattern of (2) relevant (3) unconstitutional conduct (4) by states.<sup>251</sup> In this case, the unconstitutional conduct would be state government sexual orientation-based employment discrimination that is unconstitutionally irrational. *Garrett* provides the clearest guidance on what the Court might demand. In *Garrett*, the Court acknowledged the finding in the ADA that discrimination on the basis of disability “continue[s] to be a serious and pervasive social problem”<sup>252</sup> and conceded that that conclusion was supported by evidence assembled by Congress.<sup>253</sup> However, the Court refused to consider such findings and evidence relevant, since the “great majority” of the incidents cited in the record did not involve states.<sup>254</sup> Having limited the field of inquiry to examples of conduct engaged in by state governments, the Court then further limited the field to examples of conduct by state governments in the field of employment.<sup>255</sup> Rejecting Justice Breyer’s compilation of state discriminatory conduct against the disabled, the Court stated that “only a small fraction” of the incidents Justice Breyer cited dealt with employment.<sup>256</sup> According to the Court, “the overwhelming majority” of those incidents alleged discrimination by states in the provision of public services and public accommodations, areas addressed by other parts of the ADA not challenged in *Garrett*.<sup>257</sup> Finally, the Court questioned whether the examples provided of state government employ-

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<sup>251</sup> See *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 965 (2001) (restricting the appropriate field of inquiry to conduct by states, not including units of local governments such as cities or counties).

<sup>252</sup> *Id.* (quoting 42 U.S.C. § 12101(a)(2) (1994)).

<sup>253</sup> See *id.*

<sup>254</sup> See *id.*

<sup>255</sup> See *id.*

<sup>256</sup> *Garrett*, 121 S. Ct. at 965 n.7.

<sup>257</sup> See *id.*

ment discrimination reflected unconstitutional conduct on the states' part.<sup>258</sup>

After *Garrett*, then, plaintiffs (and Congress) face a difficult task of compiling a detailed record including examples of the specific violations the statute seeks to remedy. The question, then, is whether the phenomenon of sexual orientation-based employment discrimination is easily susceptible to the compilation of such a record.

The normal way of developing any legislative record would be for Congress to look at the issue, seek out evidence, and find facts based on the evidence it examined. In the case of discrimination, though, the possibility always exists that such an examination will not reveal the true extent of the problem. Indeed, the Court's Section 5 jurisprudence recognizes this difficulty. Proof problems not only lay behind the Court's willingness to allow Congress, under Section 5, to prohibit more conduct than required by Section 1<sup>259</sup> but also help explain the *Morgan* Court's overall deference to legislative judgments regarding the need for particular restrictions on state conduct in order to guarantee Fourteenth Amendment rights.<sup>260</sup>

It is important to distinguish between these two versions of the proof problem. In *Kimel*, for example, the Court reaffirmed the concept enunciated in *City of Rome v. United States* that Congress had the power under Section 5 "to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."<sup>261</sup> In order to use Section 5 to enact such broader prohibitions, however, the *Kimel* Court insisted that there be a record of a problem that demanded such a broad remedy and concluded that Congress had created no such record.<sup>262</sup> By contrast, the Court in *City of Rome* reiterated earlier cases' conclusions

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<sup>258</sup> See *id.* at 964-65, 966.

<sup>259</sup> See *City of Rome v. United States*, 446 U.S. 156, 176 (1980); see also *Garrett*, 121 S. Ct. at 963; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); cf. *supra* note 65 and accompanying text (noting Professor Tribe's comparison of the *City of Rome* "wider net" theory to a rule of evidence).

<sup>260</sup> See *Kimel*, 528 U.S. at 81 ("It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference.") (quoting *City of Boerne*, 521 U.S. at 536 (in turn quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966))); *Morgan*, 384 U.S. at 651 (Section 5 "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.").

<sup>261</sup> 528 U.S. at 81.

<sup>262</sup> See *id.* at 88-91.

that the Voting Rights Act was justified by legislative factfinding about southern states' attempts to infringe on African-Americans' voting rights.<sup>263</sup> These proof problems come together, though, when considering the appropriateness of prophylactic legislation: If a discrimination problem requires a broad remedy because the discrimination is easy to disguise, it might well be that Congress will have a similarly difficult time uncovering the problem and creating an airtight record of its existence. In such a situation, the Court would be faced with the choice of deferring to Congress' determination (perhaps without overwhelming evidentiary support) that a problem existed or allowing the very insidiousness of the problem to serve as a shield from remedial legislation.

In the case of age- or disability-based discrimination it is easy to imagine the problem. Such discrimination can be veiled under non-objectionable criteria such as merit or efficiency, thus making the actual violation hard to spot and broader remedial rules acceptable. The problem is magnified if we take a broader view of the harm caused by such discrimination. If that discrimination not only harms those who actually are employed or apply for employment, but also deters many people from seeking work, then the extent of the discrimination may well touch individuals well-hidden from congressional investigation, not to mention as a practical matter unable to sue to enforce their right to equal treatment.<sup>264</sup> In such cases, the best factfinding that could be expected would yield only a rough under-

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<sup>263</sup> See 446 U.S. at 174.

<sup>264</sup> For example, there would be a serious question whether someone deterred from seeking work because of suspected discrimination by the would-be employer would have standing to sue in federal court given the relatively strict causal links required for a plaintiff to have standing. Compare, e.g., *Warth v. Seldin*, 422 U.S. 490, 504, 505 (1975) (denying standing to would-be residents of a township alleged to have engaged in discriminatory zoning on the ground that it was unclear whether the zoning decisions had in fact caused home builders to not build the low-cost housing the plaintiffs could afford). This is not an insurmountable hurdle, however. For example, in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), the Court allowed a white-owned contractor to challenge a government set-aside policy and seek forward-looking relief without requiring it to prove that it would be the low bidder. Instead, the Court characterized the injury as impacting the plaintiff's ability to compete on equal footing with other contractors, regardless of whether plaintiff could show that it would have been successful in that competition. So too in the example in the text, a plaintiff discouraged from applying for work might be able to argue that she was deprived of her ability to compete fairly for a job, even though it was unknowable whether she would in fact have gotten the job had she applied and had the employer not discriminated. Still, the *Adarand* example enjoys a tighter causal link, if for no other reason than because the contractor in that case had bid on construction jobs before, and thus it could be presumed that the contractor would do so again.

standing of the scope of the problem based on unreliable and imprecise mechanisms such as surveys (for example, "if you knew that you wouldn't be discriminated against because of your age/disability, would you seek work?").<sup>265</sup> Nevertheless, the Court in *Garrett* did not seem moved by these difficulties confronting Congress. In the face of a congressional finding of overall societal discrimination against the disabled<sup>266</sup> and the presentation of a large number of instances of their disparate treatment,<sup>267</sup> the Court nevertheless faulted Congress for failing to provide specific examples of conduct by states,<sup>268</sup> relating to employment discrimination,<sup>269</sup> that constituted unconstitutional conduct.<sup>270</sup>

This evidentiary problem may be even more severe in the context of sexual orientation discrimination. What makes sexual orientation different from age or disability—or almost any other objectionable criterion for discriminating—is that sexual orientation can be hidden. It may be practically impossible for blacks to hide their race, for women to hide their gender, for the elderly to hide their age, or for the disabled to hide their disability, but it is not only possible, but in many situations the norm for gays and lesbians to hide their sexual orientation.<sup>271</sup> That fact makes it all the more difficult to compile a reliable record of sexual orientation discrimination, especially in the workplace, where it is normally relatively easy for a lesbian to hide her orientation, and apparently quite common.<sup>272</sup> While, for example, a heterosexual woman would not be "coming out" if she complained about discriminatory treatment, a lesbian might well be, and thus would bear an extra burden in disclosing the discrimination, whether

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<sup>265</sup> Indeed, to the extent that such indirect methods are necessary in order to ascertain the existence of discrimination, congressional (as opposed to judicial) action may be called for, since in such situations it may be difficult to structure a legal claim that meets the requisites of an Article III case or controversy. Compare, e.g., *Warth*, 422 U.S. at 508 (denying standing to plaintiffs on the ground that the causal chain between the defendants' actions and the plaintiffs' injuries was too speculative).

<sup>266</sup> See 42 U.S.C. § 12101(a)(2) (1994); see also *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 966 (2001) (quoting this finding).

<sup>267</sup> See *Garrett*, 121 S. Ct. at 977–93 (Appendix C to opinion of Breyer, J., dissenting); see also *id.* at 966 (responding to Appendix C).

<sup>268</sup> See *id.* at 965.

<sup>269</sup> See *id.* at 966 n.7.

<sup>270</sup> See *id.* at 965–67.

<sup>271</sup> A Philadelphia survey found that 76% of gay men and 81% of lesbians said they concealed their sexual orientation in their workplace. See JAMES D. WOODS & JAY H. LUCAS, *THE CORPORATE CLOSET* 8 (1993).

<sup>272</sup> See *id.*

to a government investigator, a journalist, or her attorney.<sup>273</sup> Nor, contrary to Justice Kennedy's suggestion in his *Garrett* concurrence, would prior litigation patterns necessarily reveal the existence or scope of the problem if the offending conduct resulted "only" in a gay person remaining closeted at work.<sup>274</sup> Indeed, since only one or two overt acts of discrimination might suffice to keep all gays at that workplace closeted, the scope of the problem might substantially exceed the amount of any litigation.<sup>275</sup>

Moreover, forcing a gay man or lesbian to stay in the closet at work—on pain of official action such as firing or demotion or unofficial action such as harassment or threatened or actual violence—could very easily be considered discriminatory in itself, to the extent that the workplace tolerates statements of, or openness about, heterosexual orientation.<sup>276</sup> Of course, it would be even harder for Congress to construct a record of that kind of evidence, at least in the sense required by the Court up to now—that is, with actual examples of individual violations in which there was a direct causal link between the employer's conduct and the harm suffered by the employee.<sup>277</sup>

Because of this hidden nature of the discrimination problem, there would be a stronger argument for deferring to legislative factfinding that was based not on explicit examples of wrongdoing (such as lawsuits or even complaints to EEOC-type offices) but instead on more aggregate studies that document this phenomenon in general. And it is, of course, exactly that type of factfinding that courts

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<sup>273</sup> Of course, this is not to minimize the difficulties faced by other groups, such as women, when they complain about discrimination. It is merely to point out that the option of the closet means that a lesbian's decision to complain imposes on her an additional burden not borne by others whose membership in the burdened group is already obvious to all.

<sup>274</sup> See *Garrett*, 121 S. Ct. at 968 (Kennedy, J., concurring).

<sup>275</sup> The situation is different when there is discrimination by the employer, or harassment by co-workers, on the basis of perceived sexual orientation. In that case, the victim has been "outed" (whether accurately or not, since the basis of the negative treatment is only a perception), and the closet has been taken away as an option. On the other hand, such punitive outings (whether accurate or not) might aggravate the closetedness of other employees, thus creating a larger problem, again hidden from the typical record-creating methods the Court appears to favor in Section 5 cases.

<sup>276</sup> For example, Title VII prohibits discrimination under any terms, conditions, or privileges of employment. See 42 U.S.C. § 2000e-2(a)(1) (1994).

<sup>277</sup> Presumably, such evidence would have to suggest the existence of an injury from having to stay in the closet, and some causal link between that injury and the need to stay in the closet at the workplace in particular. Whether such injury, assuming it can be identified, can be parceled out in terms of its causation is questionable, at least with the degree of precision the Court seems to have required in *Garrett*.

are incompetent to perform and where deference to the legislature is thus most appropriate. Whether the Court would be willing to credit such factfinding is unclear, given its recent insistence on actual examples of unconstitutional conduct performed by states.<sup>278</sup>

In sum, then, litigants may well be able to demonstrate both ENDA's congruence and proportionality and the existence of the underlying discrimination but only if courts recognize the breadth and inchoate nature of both discriminatory conduct and the harms therefrom. A fair test of ENDA as appropriate Section 5 legislation would also require courts to understand the uniqueness of discrimination based on sexual orientation. These difficulties require that Congress consider carefully its factfinding responsibility. The next Part of this Article evaluates the factfinding reflected in current versions of ENDA and offers suggestions for further investigation and findings of fact that the Court might find useful in its Section 5 inquiry.

### III. (UNSOLICITED) ADVICE TO CONGRESS

The Court's new Section 5 jurisprudence clearly requires more from Congress in the way of proof. This requirement applies especially when the statute addresses an area the Court itself has not considered particularly problematic from an equal protection standpoint. *City of Boerne v. Flores*, *Florida Prepaid v. College Savings Bank*, *Kimel v. Florida Board of Regents*, and *Board of Trustees of the University of Alabama v. Garrett* all criticized the lack of evidence that states were engaging in widespread constitutional violations.<sup>279</sup> *Garrett* also criticized the lack of actual legislative findings of such violations.<sup>280</sup> Under these cases, then, drafters of ENDA should consider carefully both the findings ultimately made in the bill and their evidentiary support in the legislative record.

#### A. *Documentation and Findings of Actual Government Bias Against Gays and Lesbians in Hiring*

An obvious place to start with legislative investigation is the existence and scope of state government employment bias against gays

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<sup>278</sup> See, e.g., *Garrett*, 121 S. Ct. at 964-66; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89-91 (2000).

<sup>279</sup> See *Garrett*, 121 S. Ct. at 964-966; *Kimel*, 528 U.S. at 89-91; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 644-47 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 530, 531 (1997).

<sup>280</sup> See 121 S. Ct. at 966.

and lesbians. This should not be surprising: Statutes justified under Section 5 must identify the unconstitutional conduct triggering congressional action. Still, *Garrett* and the other recent Section 5 cases make this documentation task more challenging than under earlier cases such as *Katzenbach v. Morgan*, even assuming that *Morgan* would have required such evidence.<sup>281</sup>

Several problems might arise with regard to Congress' documentation of sexual orientation discrimination in the workplace. First, as noted earlier, the option of the closet makes documentation of actual workplace discrimination harder for sexual orientation claims, as opposed to claims based on other characteristics such as age or race.<sup>282</sup> Indeed, the pressure gays may feel to stay in the closet could itself be considered an aspect of workplace discrimination, an aspect which would be even more difficult to document. Thus, the Court's insistence on the presentation of actual examples of unconstitutional conduct in numbers amounting to a pattern of such behavior by the states seems at first glance inappropriate to the inquiry with regard to sexual orientation.

Still, the examples of intentional discrimination against gays and lesbians are, sadly, sufficiently numerous that a lengthy record of such conduct perpetrated by states could easily be compiled by Congress.<sup>283</sup> And since such intentional discrimination will so rarely be motivated by a reason sufficiently rational to satisfy equal protection, most of the examples found will most likely qualify as instances of unconstitutional discrimination and thus directly support ENDA's validity.

Second, while under *City of Rome v. United States* government practices having a disparate impact might be viewed as justifying broader remedial legislation if Congress determines that such disparate im-

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<sup>281</sup> See *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (stating that it was only necessary for the Court to perceive a basis for the prophylactic action taken by Congress); see also *City of Rome v. United States*, 446 U.S. 156, 177 (1980) ("Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.") (footnote omitted). Compare, e.g., *Garrett*, 121 S. Ct. at 964-66 (requiring particularized findings of unconstitutional action by state governments).

<sup>282</sup> See *supra* notes 274-275 and accompanying text.

<sup>283</sup> A brief perusal of the Internet reveals several sites dedicated to documenting anti-gay actions, including employment discrimination. See, e.g., Human Rights Campaign, Documenting Discrimination (documenting examples of private and public sector discrimination, including employment discrimination, based on sexual orientation), at <http://www.hrc.org/publications/pdf/DocumentingDiscrimination.pdf> (last visited Nov. 25, 2001).

pact suggests the presence of intentional, invidious discrimination,<sup>284</sup> it might be harder to convince the Court that government actions having a disparate impact on gays hide an invidious intent. As noted earlier, ENDA disallows disparate impact claims.<sup>285</sup> Nevertheless, findings of disparate impact could be useful to a court when considering ENDA's constitutionality, as they might suggest the existence of invidious discrimination.

Still, the Court might have a problem with this latter approach. First, the possibility of a gay or lesbian employee remaining in the closet may lead the Court to wonder whether the asserted disparate impact actually exists. Of course, this is ironic: A homosexual's self-infliction of the closet would cause the additional harm of casting doubt on the existence of the discrimination. Second, the Court may view homosexuality as more of a cultural phenomenon than, say, racial identity, with the result that the claimed disparate impact may be viewed not as a result of intentional discrimination but instead as a result of employment or career choices made by gays or lesbians.<sup>286</sup> At any rate, these factors could easily be expected to hover in the back of the Court's mind, leading it perhaps to demand more before disparate impact would be seen as persuasive evidence of discriminatory intent.

#### B. *Documentation of the Relative Likelihood of Sex Crimes by Homosexuals and Heterosexuals*

This may sound like an odd subject with which Congress should concern itself. However, it may be something that is necessary, and certainly useful, in getting ENDA past the hurdle posed by *Bowers v. Hardwick*. Essentially, evidence that homosexuals engage in illegal sexual activity as much as heterosexuals would call into question the rationality of a state argument (or a court making the state's argument under the rational basis test) that employment discrimination based on sexual orientation is an appropriate way of ensuring that the

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<sup>284</sup> See 446 U.S. at 177.

<sup>285</sup> See *supra* note 222 and accompanying text.

<sup>286</sup> Indeed, in the context of race, where the Court uses what is arguably a similar strict scrutiny standard, compare *Post & Siegel*, *supra* note 135, at 677, the Court discounted such disparate result data, wondering whether the data reflected not so much discrimination but instead career choices made by African Americans. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989). As in *Croson*, the Court might require Congress to make a stronger showing that the disparate result was attributable to discrimination and not to choices made by gays. See *id.*

state not hire persons likely to violate the law. This sort of factfinding, for which there is empirical evidence in the social science literature,<sup>287</sup> is the sort most likely to be accepted by the Court. It deals with social reality, not legal concepts that might lead the Court to suspect that Congress was attempting to interpret the Fourteenth Amendment.<sup>288</sup> Moreover, its social science/empirical basis makes it the type of issue where Congress' competence is most pronounced, relative to the Court's.

A problem with this analysis is the existence of sodomy statutes that restrict only same-sex conduct. Currently, six states maintain sodomy statutes that apply only to same-sex conduct.<sup>289</sup> This fact raises the specter of a court questioning Congress' finding, since, at least in those states, only same-sex sodomy is a crime. This raises an interesting, potentially circular argument: Gays and lesbians can be discriminated against in the workplace because they are more likely to commit sex crimes, and they are more likely to commit sex crimes because some sex crime statutes are targeted at same-sex conduct. Once again, *Hardwick* intrudes into the equal protection argument due to the complex relationship between conduct and status. However, there is at least reason to wonder whether sodomy statutes confined to same-sex conduct remain viable after *Romer v. Evans*. Moreover, this problem becomes less pressing as the number of states with sodomy laws falls, as those laws are either repealed or struck down under state constitutional principles.<sup>290</sup>

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<sup>287</sup> See Booth, *supra* note 194, at 1260 (citing studies); Captain John A. Carr, *The Difference Between Can and Should: Able v. United States and the Continuing Debate About Homosexual Conduct in the Military*, 46 A.F. L. REV. 1, 7–8 nn.26–29 (1999) (same).

<sup>288</sup> An example of the latter type of finding that the Court might reject would be one, made perhaps in response to *Florida Prepaid*, that states were depriving patent holders of property "without due process." See 527 U.S. 627, 641–43 (1999). Compare *City of Boerne v. Flores*, 521 U.S. 507, 534–35 (1997) (rejecting what the Court considered Congress' attempt to reinterpret the Free Exercise Clause under the guise of its enforcement power under Section 5).

<sup>289</sup> See Tony Varona, *Equal Justice: Federal and State Courts Continue to Shape Lesbian and Gay Equal Rights*, HRC Q., Spring 1999, available at <http://www.hrc.org/publications/hrcq/hrcq99sp/pg17.asp> (last visited Nov. 25, 2001).

<sup>290</sup> See *id.* (noting that courts in four states have recently invalidated their sodomy laws); see also, e.g., <http://www.geocities.com/privacylaws/legal.htm> (describing case law from numerous states where the courts have struck down the state's sodomy law as unconstitutional).

### C. *The Irrationality of Sexual Orientation Discrimination*

Finally, it makes sense for Congress to discuss in its findings the irrationality of sexual orientation discrimination in government workplaces. Previous versions of ENDA have recited findings about the lack of a relationship between an individual's sexual orientation and his or her ability to contribute to the economic life of the nation.<sup>291</sup> Still, *Kimel* and especially *Garrett* suggest that the Court would not consider such a finding dispositive. In *Kimel*, the Court ignored the legislative findings that employers imposed "arbitrary" age limits on workers.<sup>292</sup> Instead, the Court concluded, based on its own investigation of the record, that Congress had not found sufficient instances of age discrimination that were so irrational as to violate equal protection.<sup>293</sup> *Kimel*, however, does not fully resolve the question of the Court's response to Congress' findings, since in the ADEA the reference to "arbitrary" age limits may well have been to the simple drawing of a bright line age cut-off rather than an age limit that was necessarily "arbitrary" in the sense of being unreasonable or irrational.

In *Garrett*, however, the Court faced somewhat more definite congressional findings about the irrationality of the type of discrimination being outlawed. In the ADA, Congress found the "continuing existence of unfair and unnecessary discrimination,"<sup>294</sup> which cost the nation "billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."<sup>295</sup> Similarly, Congress found that individuals with disabilities "have been faced with restrictions . . . resulting from stereotypic assumptions not truly indicative of the ability of such individuals to participate in, and contribute to, society."<sup>296</sup> Read broadly, these findings could be taken as legislative uncovering of a significant problem with disability-based discrimination that was irrational in the sense of not being justified on a cost-benefit basis. Indeed, the dissent in *Garrett* cited these findings in arguing that the ADA was an appropriate response to that problem.<sup>297</sup> The majority, however, did not discuss these particular findings. Instead, it focused on the finding that Congress did *not* make, either in the statute or in

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<sup>291</sup> See, e.g., S. 2238, 103d Cong. § 2(a)(1) (1994).

<sup>292</sup> See 29 U.S.C. § 621(a)(4), (a)(5) (1994); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88-91 (2000).

<sup>293</sup> See *Kimel*, 528 U.S. at 88-91.

<sup>294</sup> 42 U.S.C. § 12101(a)(9) (1995) (emphasis added).

<sup>295</sup> *Id.* § 12101(a)(9) (emphasis added).

<sup>296</sup> *Id.* § 12101(a)(7).

<sup>297</sup> See 121 S. Ct. 955, 971, 972 (2001) (Breyer, J., dissenting).

the committee reports on the bill: Namely, that states engaged in a pattern and practice of unconstitutional conduct<sup>298</sup> with regard to the employment of disabled persons.<sup>299</sup>

The Court's refusal to credit Congress' findings in the ADA suggests several conclusions. First, and most obviously, legislative findings must be quite precise in order to satisfy the Court that the accompanying prohibitions are valid Section 5 enactments. In particular, the findings must refer to states themselves (not just "society" or "employers"), and they must refer to irrational or unreasonable conduct. Second, and more generally, the *Garrett* Court may have interpreted such findings as attempts by Congress to interpret the Fourteenth Amendment to the extent those findings purported to determine that discrimination against the disabled was often unconstitutionally irrational. In that sense, the Court might have viewed these findings as analogous to RFRA: Just as RFRA was thought to have represented a congressional attempt to reinterpret the Free Exercise Clause, so too these findings might have been seen as attempts by Congress to perform the rational basis review the Court may have thought was its own domain.

The first of these concerns—about the precision of Congress' findings—is easy enough to address in ENDA, assuming that empirical evidence exists allowing Congress to honestly make the finding. The second concern, however, raises a more theoretical and difficult question: To what extent may Congress cast as "findings" statements that have direct legal significance? For example, if Congress were to "find" that a particular government act (say, an affirmative action program) "was narrowly tailored to meet a compelling government interest," would the Court accept that "finding" or discount it as an obvious attempt to short-circuit the Court's role in performing judicial review?<sup>300</sup> An analogy might be found in appellate review of lower

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<sup>298</sup> See *id.* at 966 (noting the lack of a legislative finding of unconstitutional conduct by states); *id.* (noting that committee reports cited problems with employment discrimination in the private sector but did not mention government employment).

<sup>299</sup> See *id.* at 966 n.7 (stating that most of the examples of state government discrimination cited by the dissent did not involve employment, and those that did were described so generally as to make it impossible to know whether they constituted unconstitutional action by the state).

<sup>300</sup> Compare *United States v. Klein*, 80 U.S. 128, 146–47 (1871) (striking down a law that, according to the Court, prescribed a "rule of decision" for the courts and thus infringed on the judiciary's role), with *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992). In *Seattle Audubon*, the Court upheld, against a *Klein* challenge, a law that "determined and directed" that U.S. Forest Service compliance with certain new requirements for managing federal forests "was adequate consideration for the purpose of meeting the

court factfindings. For example, one appellate court (dealing, ironically, with the question whether gays and lesbians constitute a suspect class) viewed the trial court's determination of that issue as a "constitutional fact" that was supported by the trial court's "ultimate facts and interrelated applications of law, sociological judgments, [and] mixed questions of law and fact."<sup>301</sup> For that reason it reviewed *de novo* the trial court's finding.<sup>302</sup> Full explanations of the constitutional fact doctrine or the scope of the "clearly erroneous" standard governing appellate review of trial court fact findings are well beyond the scope of this Article.<sup>303</sup> However, the analogy should be clear: To the extent the fact that is found (either by a trial court or Congress) starts to take on the character of a legal holding, appellate review (or, in the case of legislatively found facts, judicial review in general) may appropriately become less deferential.

Regardless, Congress could probably avoid this problem with regard to ENDA because it should be relatively easy to marshal sociological and other social science data supporting the proposition that sexual orientation has no impact on the factors that are relevant to successful employment.<sup>304</sup> The empirical nature of this finding makes it more likely that the Court would credit it as being within Congress' area of expertise and authority, as opposed to an attempt to engage in law-interpreting as the Court clearly suspected in *City of Boerne*.<sup>305</sup> Put another way, the empirical nature of the facts found leaves courts with the ultimate authority to decide how those facts affect the outcome of

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statutory requirements that are the basis of" certain pending lawsuits that the statute identified by name and docket number. *Id.* at 437, 439. On the difficulty of determining when legislative action of this sort intrudes into the judicial realm, see generally William D. Araiza, *The Trouble With Robertson: Equal Protection, the Separation of Powers and the Line Between Statutory Amendment and Statutory Interpretation*, 49 CATH. U. L. REV. 1055 (1999).

<sup>301</sup> Equal. Found. of Cincinnati v. City of Cincinnati, 54 F.3d 261, 265 (6th Cir. 1995).

<sup>302</sup> See *id.*

<sup>303</sup> See generally, e.g., Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

<sup>304</sup> See, e.g., *The Employment Non-Discrimination Act (ENDA): Testimony Before the Senate Comm. on Labor and Human Resources, 105th Cong.* (1997) (statement of the American Psychological Association, available at <http://www.apa.org/ppo/issues/pendatest.html> (asking "Are lesbians and gay men psychologically abnormal which would justify work place discrimination?" and answering "No.") (last visited Nov. 25, 2001). On the recent trend toward increased use of social science data in gay rights litigation, see generally Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation, and Dissemination Efforts*, 41 WAYNE L. REV. 1 (1994).

<sup>305</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (describing the burdensomeness of the prohibitions RFRA imposed on states "to illustrate the substantive alteration [of the Court's earlier interpretation of the Free Exercise Clause] attempted by RFRA").

a particular legal test, for example, whether a government action was motivated by a compelling interest or was so "irrational" as to violate the rational basis test of equal protection.<sup>306</sup>

By contrast, one finding that the Court ignored in *Garrett* and, based on the above analysis, is likely to ignore in ENDA concerns the status of the benefited group as a suspect class. In the ADA, Congress "found" that the disabled had all the indicia of a suspect class: According to Congress, they were a "discrete and insular minority," "subjected to a history of purposeful unequal treatment," and "relegated to a position of political powerlessness, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the ability of such individuals to participate in, and contribute to, society."<sup>307</sup> These words could have come out of the Supreme Court itself (indeed, they have),<sup>308</sup> which may be the reason the Court thinks those determinations belong to it rather than to Congress.<sup>309</sup>

The upshot, then, is that drafters of ENDA may wish to think about linking findings of the irrationality of sexual orientation-based employment discrimination to empirical evidence of sexual orientation's irrelevance to successful employment.<sup>310</sup> Such evidence should

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<sup>306</sup> Obviously, this is not a clean line. "Irrationality" could be found empirically, or it could be a legal conclusion. Thus, if Congress finds that sexual orientation discrimination in employment is "irrational," it might be taken as either a statement of empirical reality or as an attempt to pre-determine the Court's application of the rational basis test. Compare *United States v. Klein*, 80 U.S. 128, 146-47 (1871) (striking down a statute because it prescribed a "rule of decision" for the courts and thus intruded into the judiciary's realm). Thus, as discussed in the accompanying text, how the Court ultimately reads such a fact finding may turn on the type of record evidence that supports it.

<sup>307</sup> See 42 U.S.C. § 12101(a)(7) (1994) ("[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.").

<sup>308</sup> See, e.g., *Bowen v. Gillard*, 483 U.S. 587, 602 (1987) (noting the characteristics of suspect classes); *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (same); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 26 (1973) (same).

<sup>309</sup> Compare *Equal. Found. of Cincinnati v. City of Cincinnati*, 54 F.3d 261, 265 (6th Cir. 1995).

<sup>310</sup> It might even be helpful, though it seems excessive, to focus this finding specifically on government employment. This further specificity may seem unnecessary; after all, government employment is not so different in character from employment in the private sector, and so the irrelevance of sexual orientation discrimination in employment in general should presumably apply to government employment. But given how much specificity the Court seems to demand, it may be prudent to provide a finding as narrowly tailored as

be presented and cited in the legislative history and the bill's findings themselves, not only because the Court now looks more closely at congressional findings in general,<sup>311</sup> but because these findings may be construed as either empirical or partially legal due to their special nature.<sup>312</sup>

#### IV. THOUGHTS ON THE COURT'S SECTION 5 JURISPRUDENCE IN LIGHT OF ENDA'S POSSIBLE FATE

The scope of the Section 5 power is a breathtakingly broad topic, involving issues of the separation of powers, judicial supremacy, federalism, and the scope of the individual liberties in both the Fourteenth Amendment itself and, via incorporation, the Bill of Rights. For this reason, some humility may be called for when attempting to discern the proper scope of that power. This concluding part of the Article attempts to offer some modest insights into the Section 5 issue. It proceeds from a proposition broadly accepted by the current Court: that RFRA was unconstitutional. It then considers why RFRA may have gone beyond Congress' Section 5 power and applies that tentative reasoning to federal laws justified as provisions enforcing the equal protection guarantee. It concludes by considering Congress' special role in identifying discrimination that society no longer considers reasonable, including sexual orientation discrimination.

##### A. *A First Cut: Congress' Use of Legal Terms of Art*

In approaching the issue, it may help to start by thinking about the one case of those which this Article has discussed that did not produce a dissent on the Section 5 issue: *City of Boerne v. Flores*.<sup>313</sup> What was it about RFRA that allowed the Court, sharply divided on so many of the issues encompassed within the Section 5 issue, to forge some-

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this. The same would go for record evidence supporting that finding. *See infra* text accompanying notes 311-312.

<sup>311</sup> Cf. *Garrett*, 121 S. Ct. at 969 (Breyer, J., dissenting) (comparing the Court's review of the congressional record "as if it were an administrative agency record"). *See generally*, e.g., Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731 (1996).

<sup>312</sup> *See supra* notes 300-306 and accompanying text.

<sup>313</sup> Justices O'Connor, Souter, and Breyer all dissented, but Justice O'Connor agreed with the majority's analysis of the Section 5 issue, while Justices Souter and Breyer refrained from expressing an opinion, resting their positions on whether *Smith* was properly decided. *See* 521 U.S. 507, 545 (1997) (O'Connor, J., dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

thing of a consensus that RFRA was unconstitutional? One obvious characteristic of RFRA was that it used legal terms of art, namely, mandating that government not “substantially burden”<sup>314</sup> a person’s religious exercise unless the burden furthered “a compelling government interest”<sup>315</sup> and was “the least restrictive means”<sup>316</sup> of furthering that interest. Initially, our intuition might be that there is something inappropriate about Congress’ use of such “legal” terms. On reflection, though, that intuition reveals itself as incorrect. For example, if Congress thought that any racial disparities in employment were an abomination that should be allowed only if absolutely necessary, there would be nothing wrong with it using these terms in a statute mandating racial proportionality in every workplace in the country unless it was critical that a disparity be maintained. Indeed, using these terms brings the clarity of a common language: Congress knows what those terms mean to the courts, and the courts know that Congress knows, with the result that there is increased predictability and accuracy in the dialogue between the judiciary and the legislature.

#### B. *A Second Cut: Judicial Supremacy*

A more subtle version of our initial intuition might revolve around the kind of issue on which Congress was legislating. On this view, RFRA’s problem was that it used these legal terms in an area subject to the courts’ ultimate authority: the meaning of the Constitution. The sequences of events leading to *City of Boerne* suggests the problem. In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court interpreted the Free Exercise Clause so as to subject government action burdening religion to less stringent scrutiny than the compelling government interest test that had prevailed since *Sherbert v. Verner*.<sup>317</sup> In RFRA, Congress sought to overturn *Smith* and reinstate a version of the *Sherbert* test.<sup>318</sup> In turn, *City of Boerne* struck RFRA down as exceeding Congress’ power to “enforce” the free exercise guarantee.<sup>319</sup>

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<sup>314</sup> 42 U.S.C. § 2000bb-1(a) (1994).

<sup>315</sup> *Id.* § 2000bb-1(b) (1).

<sup>316</sup> *Id.* § 2000bb-1(b) (2).

<sup>317</sup> See generally *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

<sup>318</sup> See *supra* note 73 and accompanying text (noting the Court’s statement in *City of Boerne* that RFRA actually went beyond the *Sherbert* test).

<sup>319</sup> 521 U.S. 507, 536 (1997).

On the other hand, commentators have argued that this sort of legislative disapproval of a constitutional law standard is unexceptional and not troubling, at least when the legislative response increases, rather than limits, the scope of the right.<sup>320</sup> The existence of a tradition of such legislative expansions of rights<sup>321</sup> provides a troubling response to the argument that fundamental separation of powers principles, informed by statements of judicial power such as *Marbury v. Madison*<sup>322</sup> and *Cooper v. Aaron*,<sup>323</sup> flatly foreclose any role for Congress in interpreting the Constitution.

Further concerns arise when one considers the difference most commentators perceive<sup>324</sup> between *Katzenbach v. Morgan*'s two rationales for upholding the Voting Rights Act provisions challenged in that case: First, the theory that Congress may have been seeking to protect the rights of Puerto Ricans to equal attention from government, which, in Congress' view, could best be achieved by ensuring their voting rights; and, second, the theory that Congress could have determined for itself that the inequality suffered by Puerto Ricans constituted invidious discrimination and was thus itself unconstitutional. As the *City of Boerne* Court conceded, though, "the line between measures that remedy or prevent unconstitutional action and measures that make substantive changes in the governing law is not easy to discern."<sup>325</sup> Indeed, *Morgan*'s discussion of this second rationale referred to Congress' institutional competence,<sup>326</sup> an interesting observation in light of the congressional law-interpreting function that that rationale is thought to embrace.

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<sup>320</sup> See, e.g., Vergeer, *supra* note 60, at 671-79 (providing examples of legislative reversals of Supreme Court decisions enunciating constitutional doctrine). Professor Vergeer also cites one example of a statute restricting a right found by the Court: The law Congress enacted in the aftermath of *Miranda v. Arizona*, 384 U.S. 436 (1966), reinstating a more flexible standard for judging the voluntariness of a confession. See Vergeer, *supra*, at 674. The viability of the idea that Congress can restrict a Court-found constitutional right as easily as it can expand one is now in doubt after *Dickerson v. United States*, 530 U.S. 428, 432 (2000), in which the Court held that *Miranda*'s confession rule was constitutionally based and could not be overruled by a legislative act.

<sup>321</sup> See *supra* note 320 and accompanying text.

<sup>322</sup> 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>323</sup> 358 U.S. 1, 17 (1958) (suggesting that the Supreme Court's exposition of the Constitution is itself the law of the land).

<sup>324</sup> For a notable exception, see Vergeer, *supra* note 60, at 693-96 (arguing that these two differences are more the product of post-*Morgan* commentary than the text or reasoning of the opinion itself).

<sup>325</sup> 521 U.S. 507, 519-20 (1997). See generally Araiza, *supra* note 300 (discussing an analogous line-drawing difficulty in the context of normal statutes).

<sup>326</sup> 384 U.S. 641, 656 (1966).

### C. A Third Cut: The Nature of the Equal Protection Guarantee

A third cut at our intuition, informed by our progress so far, should also focus on the kind of issue on which Congress was legislating but from a slightly different perspective. This approach focuses on the type of constitutional right Congress is attempting to affect through its Section 5 power. The key distinction here is between equal protection rights and other rights found in the Fourteenth Amendment.

Equal protection is an enormously powerful tool. In contrast to the Fourteenth Amendment's Privileges and Immunities Clause, which simply protects certain fundamental interests (interpreted quite narrowly since the *Slaughter-House Cases*),<sup>327</sup> and the Due Process Clause, which protects only life, liberty, and property interests,<sup>328</sup> the Equal Protection Clause prohibits any government action that discriminates invidiously, regardless of the importance of the interest.<sup>329</sup> Thus, the military's eligibility rules for dependents' benefits,<sup>330</sup> a city's distribution of contracting business,<sup>331</sup> its regulation of advertising on trucks,<sup>332</sup> and even its singling out of an individual homeowner with regard to utility connections<sup>333</sup> all raise equal protection concerns. While the other Fourteenth Amendment guarantees demarcate particular freedoms or interests government cannot intrude on, equal protection is a broad command of equal, or fair, treatment across every sphere of government action.<sup>334</sup>

The breadth of the equal protection guarantee suggests that Congress should have broader discretion to "enforce" it compared with other Fourteenth Amendment rights. At base this might have to do with the character of the rights guaranteed. Concepts such as "lib-

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<sup>327</sup> See generally 83 U.S. (16 Wall.) 36 (1873).

<sup>328</sup> Compare, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 671-75 (1999) (refusing to consider a business' interest in its competitor not engaging in false advertising as a due process-protected "property" interest).

<sup>329</sup> It should be noted that there is a strand of equal protection jurisprudence that focuses on the importance of the benefit or burden that is being distributed unequally. See generally, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (right to vote). This Article focuses instead on the main component of equal protection jurisprudence, which, in turn, focuses on the identity of the group being burdened as opposed to this "fundamental rights" strand.

<sup>330</sup> See generally *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>331</sup> See generally *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>332</sup> See generally *Ry. Express Agency v. People of State of N.Y.*, 336 U.S. 106 (1949).

<sup>333</sup> See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 566 (2000) (allowing assertion of equal protection claim by a class of one).

<sup>334</sup> See *supra* note 329 and accompanying text.

erty interests," "cruel and unusual punishment," or "free exercise of religion" have as much legal as empirical meaning. For example, as laypersons we might call many things "cruel" that the Court would not consider "cruel and unusual."<sup>335</sup> By contrast, the constitutional requirement of equal or fair treatment may be more readily comprehensible as a non-legal matter. In other words, whatever one might think about the reasonableness of a distinction between a lay person's understanding of "cruelty" and what the Court considers "cruel and unusual punishment," it is surely much more difficult to justify a difference between lay and legal understandings of fairness or equality. Indeed, this difference is suggested by the very vacuousness of the term "equal protection" (vacuous since all legislation classifies) and the strong pull political process theory has had in the equal protection area, both of which suggest that an inherently legal, or specialized, definition of equality simply does not exist.<sup>336</sup> To be blunt: "Cruel and unusual punishment" may be a term of art; "equality" is much less so.

In turn, equality's less specialized meaning potentially justifies a wider berth for legislative assistance in informing the Equal Protection Clause. Thus, while the *City of Boerne* Court might have been justified in considering RFRA an illegitimate congressional usurpation of the Court's power to interpret the Constitution, there may be less reason for the Court to reject congressional attempts to give meaning to the Equal Protection Clause's promise of equality. Congress might not be able to create a privilege or immunity or expand the meaning of free religious expression,<sup>337</sup> but Congress still might be able to de-

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<sup>335</sup> It should be noted, though, that often the Court will essentially ask what "we" think about these terms when it decides their meanings. See generally, e.g., *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) (holding that the Eighth Amendment prohibited the execution of a person who was fifteen years old when he committed a capital crime in large part because of a societal consensus against executions of persons that young).

<sup>336</sup> Political process theory is normally thought to have originated in the famous Footnote 4 of *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), and to have been most fully expanded into a theory by John Hart Ely. See generally JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Ironically, *Carolene Products* was a substantive due process case; still, Footnote 4's focus on legislative classifications clearly suggested the theory's ultimate home in the Equal Protection Clause.

<sup>337</sup> See Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 387-96 (1994) (arguing that Congress should be allowed less legislative leeway when altering the scope of a Bill of Rights provision incorporated against the states via the Due Process Clause as compared with the equal protection guarantee). On the other hand, Congress has wide latitude to create property and liberty interests, the deprivation of which requires

termine what constitutes invidious discrimination. Indeed, as noted above, *Morgan's* discussion of Congress' determination that the denial of voting rights to Puerto Ricans constituted invidious discrimination included a reference to congressional competence.<sup>338</sup> More generally, *Morgan* cited a variety of issues or concerns that the Court concluded were for legislative assessment and weighing:

[T]he risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school.<sup>339</sup>

The important point here is that these factors share a common-sense basis in the amount of equality that is appropriate and feasible in a given context. The point is not that the existence of these factors requires a weighing of competing considerations; in general, balancing tests may well include factors that courts are uniquely qualified to judge given the existence of extrinsic aids to identify and consider those factors.<sup>340</sup> But what extrinsic aids govern the equality determination made in the statute upheld in *Morgan*? If there are none, or few,

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satisfaction of the guarantee of procedural due process. *See, e.g.,* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642 (1999) (accepting the proposition that Congress may create property interests and then, under Section 5, legislate against their deprivation without due process); Bd. of Regents v. Roth, 408 U.S. 564, 571, 572 (1972) (explaining the theory behind legislative creation of property interests). In many ways, though, procedural due process is very different from its substantive cousin, with the former's rules deriving in large part from the different political dynamic at work when Congress grants or deprives a property interest to an entire class and when it authorizes government bodies to take away such interests on a piecemeal basis. *Compare* Arnett v. Kennedy, 416 U.S. 134, 152 (1974) (plurality opinion) (arguing that if Congress creates a property interest it should be able to attach it to a condition that its deprivation can be accomplished without a hearing), *with id.* at 164 (Powell, J., concurring in part and concurring in the judgment in part) *and id.* at 171 (White, J., dissenting) (both criticizing the plurality's theory); *see also* Araiza, *supra* note 300, at 1137 n.290.

<sup>338</sup> *See supra* note 326 and accompanying text.

<sup>339</sup> 384 U.S. 641, 653 (1966).

<sup>340</sup> *See, e.g.,* Commodities Futures Trading Corp. v. Schor, 478 U.S. 833, 853–57 (1986) (determining the legality of adjudications conducted by non-Article III federal tribunals based on a balancing of factors, including the character of the right adjudicated as public or private and the degree to which the non-Article III court exercises powers typically associated with a court).

the argument should naturally follow that Congress' enforcement power should correspondingly expand.

#### D. ENDA and Section 5

Thus, the equal protection guarantee is broad and based on a constitutional principle that is less susceptible than most to legal determination and reasoned explication. For these reasons, it is also fluid and especially susceptible to social change. Sexual orientation discrimination provides a striking example. What was once thought to be perfectly reasonable discrimination against "perverts" and, later, people with serious mental illness has come to be understood as inappropriate status-based discrimination, explainable, if at all, only as an expression of moral disapproval irrelevant to the conduct of "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."<sup>341</sup>

The fluidity of society's conceptions of appropriate and inappropriate classifications provides another reason for allowing the legislature a broader scope for enforcing the equal protection guarantee. This is especially the case with sexual orientation discrimination given the complexity of our attitudes toward sexuality and gender roles. Because understanding sexual orientation discrimination requires study and data gathering, and because equal protection may fundamentally be a matter of social consensus on what discrimination is appropriate or fair,<sup>342</sup> Congress appears well suited to play a major role in determining the contours of the broad and majestic, yet vague, command of the Equal Protection Clause.

There may be cause for concern if Congress defines those contours too narrowly, so as to violate some judicially recognized floor of protection.<sup>343</sup> But that is not an issue with ENDA. Instead, ENDA appears to be a classic example of Congress perceiving a new societal concern with a particular type of discrimination and targeting the broad command of the Equal Protection Clause toward its elimination. It does so narrowly, respecting interests (such as the right to as-

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<sup>341</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996).

<sup>342</sup> It bears repeating that political process theory attempts to provide meaning to the equal protection guarantee exactly by ensuring that all groups have a chance to influence how the legislature reads that consensus with judicial protection only for those who don't have that opportunity. See generally ELY, *supra* note 336.

<sup>343</sup> See *supra* note 231. For a thorough analysis of *Morgan's* discussion of whether Congress' power to interpret the Fourteenth Amendment includes a power to reduce protections previously found by the courts, see Vergeer, *supra* note 60, at 696-716.

sociation) that courts have recognized as constitutionally based. If Congress documents the problem of sexual orientation discrimination, the fact that courts have not themselves had significant occasion to consider the issue should not matter.<sup>344</sup> To the extent that the Supreme Court's prior attitude should matter, though, the core concern in *Romer v. Evans*—that it is unconstitutional to burden a group for no relevant reason—finds a close reflection in ENDA's findings, prohibitions, and exemptions.

Under this analysis, ENDA should be found a valid expression of Congress' Section 5 power.

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<sup>344</sup> Compare *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 968 (2001) (Kennedy, J., concurring) (identifying as a problem with the ADA the fact that few cases of allegedly unconstitutional disability discrimination had been litigated in federal court).

