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COMMENT

Section 5 Constraints on Congress Through the Lens of Article III and the Constitutionality of the Employment Non-Discrimination Act

INTRODUCTION

The Employment Non-Discrimination Act (ENDA),¹ which would prohibit state and most private employers from discriminating against their employees based on sexual orientation and gender identity, is now stalled in Congress.² While this may only be a short-term setback, some worry about the long-term viability of certain ENDA provisions. What Congress eventually gives, courts can take away.³ Commentators fear that under recent precedent, the Supreme Court will find that Congress has exceeded its enforcement powers under Section 5 of the Fourteenth Amendment and invalidate provisions in ENDA that render states liable to suits by their employees for discrimination. Because the rationale behind the Court's new and evolving Section 5 analysis is unclear, activists are unsure what arguments will convince the Court of the constitutionality of the state-suit provisions.

Section 1 of the Fourteenth Amendment protects individuals from state infringement of constitutional rights.⁴ Under Section 5 of the Amendment, Congress can "enforce" Section 1 by, for example, subjecting states to lawsuits

1. H.R. 3017, 111th Cong. (2009).

2. See Matt Baume, *ENDA Vote in Doubt amid Furious Protests*, BAY AREA REP., Sept. 16, 2010, at 3, available at <http://www.ebar.com/news/article.php?sec=news&article=5069>.

3. See, e.g., William D. Araiza, *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*, 22 B.C. THIRD WORLD L.J. 1 (2002).

4. U.S. CONST. amend. XIV, § 1.

when they violate rights.⁵ Under existing jurisprudence, the Court upholds legislation under Section 5 only if it fulfills two conditions. First, Congress cannot expand the scope of a substantive constitutional right beyond the limits that the Court has set for that right. Second, before stripping states of sovereign immunity and rendering a state liable to suit for violations of a certain right, Congress must document evidence that the state has violated the right in the past. Part I of this Comment describes how ENDA meets these two requirements, as Congress has collected evidence of specific incidents of state discrimination against lesbian, gay, and bisexual (LGB)⁶ employees that would probably be unconstitutional under the Court's existing antidiscrimination jurisprudence.

However, as Part II explains, key Justices have indicated that Section 5 legislation may have to fulfill a third condition to be constitutional. In recent cases, these Justices have expressed discomfort with legislation that prohibits unconstitutional behavior that states have *already* forbidden. Congress, they feel, should not displace state schemes, even when there is evidence of discrimination against state employees, if states are already acting to prevent this discrimination. This potential third requirement has hitherto been ignored in the literature. Advocates, however, are concerned that ENDA may flunk this requirement, as many states have already outlawed LGB discrimination.

Commentators have struggled to understand what animates the Court's jurisprudence in the Section 5 arena. After pointing out that text and precedent cannot justify its analysis, some commentators suggest that the Court is merely demoting Congress to the role of a quasi-administrative agency in this area by forcing it to collect evidence to justify its regulations. As I explain, this analogy is problematic for several reasons, including its failure to explain why certain Justices become troubled when Congress displaces existing rights-protecting state legislation with federal legislation.

Yet it is clear that key Justices are seeking to impose certain limits upon Congress's powers vis-à-vis the states and that they are still in the process of defining the structure and logic of these limits. In Part III, I argue that this logic resembles that which *courts* use to restrain themselves from interfering with the political branches of government.⁷ Section 5 requirements that focus on existing state remedies are analogous to Article III mootness constraints: just as courts cannot consider controversies that have been resolved, so too

5. *Id.* § 5.

6. My argument's relevance is limited largely to sexual orientation discrimination, upon which I focus.

7. See *infra* note 49 and accompanying text.

must Congress's power to strip states of sovereign immunity be limited when states themselves are taking steps to remedy the problem. Yet courts will examine a controversy when defendants voluntarily cease their wrongdoing if they are capable of resuming it. Similarly, Congress should be able to remedy unconstitutional discrimination that the discriminator is voluntarily correcting, especially if the discriminator may resume discriminating.

In this Comment, I do not seek to justify the new Section 5 requirement that I identify. Rather, I merely delineate its limits: just as mootness doctrine is limited in its application in certain cases, so too must these restraints on Section 5 legislation be limited when states voluntarily put in place measures that are subject to repeal.

I. THE FIRST TWO CONSTRAINTS: JUDICIAL SUPREMACY AND PROOF OF EXISTING VIOLATIONS

The Court began developing its new Section 5 jurisprudence in 1997 with *City of Boerne v. Flores*.⁸ In an earlier case, the Court had limited the First Amendment's protections against state infringement of religious practices.⁹ Invoking its Section 5 power, Congress sought to overrule the Court by expanding the rights of religious institutions against states. In *Boerne*, the Court struck down this legislative attempt to expand First Amendment rights beyond the limits that the Court had set. Congress, it held, cannot legislate into existence constitutional rights unrecognized by the Court.

The Court is unlikely to overturn ENDA by finding that it expands individuals' rights against state sexual orientation discrimination beyond the limits the Court has prescribed. While the Supreme Court has never squarely prohibited state discrimination against LGB employees under the Equal Protection Clause, both the D.C. Circuit and the Supreme Court have long hinted that federal employees may enjoy constitutional protection against dismissal because of their sexual orientation—even when national security concerns are involved.¹⁰ After *Lawrence v. Texas*,¹¹ ENDA's position is even more secure. *Lawrence*'s analysis was unclear, and a circuit split exists, as to the

8. 521 U.S. 507 (1997).

9. *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

10. See *Webster v. Doe*, 486 U.S. 592 (1988) (allowing the district court to review the due process claim brought by a man dismissed from the CIA because of his sexual orientation); *Norton v. Macey*, 417 F.2d 1161 (D.C. Cir. 1969) (referring to possible due process protections against federal discrimination on the basis of homosexuality).

11. 539 U.S. 558 (2003).

level of scrutiny employed in that case.¹² However, if the sodomy statute in *Lawrence* “furthered no legitimate state interest,” therefore flunking even rational basis scrutiny, states would be hard-pressed to justify LGB discrimination in state employment.¹³

According to the second requirement of the Court’s Section 5 jurisprudence, Congress can subject a state to suit for discrimination only if it collects evidence of past unconstitutional state discrimination. The Court first developed this requirement in *Kimel v. Florida Board of Regents*,¹⁴ when the Court struck down Age Discrimination in Employment Act (ADEA)¹⁵ provisions that allowed employee suits against states. Subsequently, *University of Alabama v. Garrett*¹⁶ invalidated key Americans with Disabilities Act (ADA)¹⁷ provisions. Most recently, the Court in *Tennessee v. Lane*¹⁸ approved ADA provisions that putatively enforced disabled individuals’ due process right to court access. Similarly, in *Nevada v. Hibbs*,¹⁹ the Court found that the state-suit provisions of the Family and Medical Leave Act (FMLA)²⁰ vindicated state employees’ rights against sex discrimination.

In each of these cases, the Justices siding with the states reviewed the preenactment evidence before Congress and found insufficient proof of state discrimination to warrant legislation stripping states of their sovereign immunity. The *Kimel* majority emphasized the need to find a “pattern of constitutional violations” that had been committed “by the States”²¹ and disparaged the actual evidence, which “consist[ed] almost entirely of isolated

12. Compare *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (reading *Lawrence* to deny heightened scrutiny to gays), with *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) (applying heightened scrutiny to discrimination against gays, as it burdens them for engaging in constitutionally protected sexual activity), and *Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (same).

13. *Lawrence*, 539 U.S. at 578. Though concerns over blackmail were prevalent in the past, they have now become irrelevant in the many cases in which LGB employees are open about their sexual orientation.

14. 528 U.S. 62 (2000).

15. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-634 (2006)).

16. 531 U.S. 356 (2001).

17. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2006)).

18. 541 U.S. 509 (2004).

19. 538 U.S. 721 (2003).

20. The Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2006)).

21. 528 U.S. at 82 (quoting and adding emphasis to *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999)).

sentences clipped from floor debates and legislative reports.”²² The *Garrett* Court criticized Congress’s failure to find a “pattern of unconstitutional discrimination” that “deal[t] with the activities of States.”²³ Similarly, Justice Kennedy’s dissent in *Hibbs* focused on the “paucity of evidence” of state discrimination.²⁴

ENDA is likely to satisfy this second evidentiary requirement, as well. Congress now benefits from hindsight that it lacked in writing the ADEA, ADA and FMLA—all passed before the Court decided *Boerne*.²⁵ With ENDA, Congress has been careful to insert evidence of anti-gay state discrimination into the legislative record, soliciting extensive testimony about LGB employment discrimination by states. For example, it entered into the record a year-long, fifty-state study conducted by the Williams Institute, a think tank on LGBT issues, which concluded that “there is a widespread and persistent pattern of unconstitutional discrimination against LGB[]state government employees, as well as against local government employees.”²⁶ Similarly, Professor William Eskridge testified that history revealed a widespread pattern of state discrimination against gays and of homosexual purges in state government.²⁷

Thus, ENDA should survive the first two constraints the Court has placed on Section 5 legislation: *Boerne*’s prohibition on the creation of new rights and *Kimel*’s evidence-of-discrimination requirement.

II. THE GROWING FOCUS ON EXISTING STATE AND LOCAL REMEDIES

Recent developments, however, suggest that the Court is poised to demand even more from Congress when it legislates under Section 5. Several members of the Court—notably Justices Kennedy, Scalia, and Thomas—have

22. *Id.* at 89.

23. 531 U.S. at 368-72.

24. 538 U.S. at 754 (Kennedy, J., dissenting); *see also id.* at 745-49.

25. The ADEA, ADA, and FMLA were passed in 1967, 1990, and 1993, respectively. *See supra* notes 15, 17, 20.

26. H.R. 3017, *Employment Non-Discrimination Act of 2009: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. 47, 51 (2009) (statement of R. Bradley Sears, Exec. Director, The Williams Institute on Sexual Orientation Law and Public Policy, UCLA School of Law), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg52242/pdf/CHRG-111hhrg52242.pdf>.

27. *Id.* at 44-46 (statement of William Eskridge, Jr., John A. Garver Professor of Jurisprudence, Yale Law School).

increasingly focused on whether states have already targeted the problem Congress is attempting to solve through the legislation in question. The requirement has slowly evolved through the line of Section 5 cases. *Kimel* references these remedies innocuously, noting in a footnote in its final paragraph that “[s]tate employees are protected by state age discrimination statutes” and citing the statutes of forty-eight states.²⁸ The list is inserted not to tell Congress that legislation was unneeded, but to offer assurance that the Court’s “decision . . . does not signal the end of the line for employees who find themselves subject to age discrimination . . . [since state-provided] avenues of relief remain available”²⁹ This issue received similarly short shrift in *Garrett*, when Chief Justice Rehnquist wrote for the majority “that by the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures,”³⁰ but neglected to say why the point was relevant.

In *Hibbs*, however, the significance of existing state and local remedies moved into clear focus in Justice Kennedy’s dissent, which was joined by Justices Scalia and Thomas. Instead of relegating a discussion of state remedies to footnotes, as did *Kimel* and *Garrett*, Justice Kennedy filled two pages of the *United States Reports* with support for his claim that “States appear to have been ahead of Congress in providing gender-neutral family leave benefits.”³¹ His point was that “the States were in the process of solving any existing gender-based discrimination in the provision of family leave”; he therefore decried “the displacement of the State’s scheme by a federal one.”³² In Justice Kennedy’s view, by taking steps to address their own unconstitutional behavior, states render their discrimination moot, and Congress has no business stripping states of sovereign immunity to solve a problem that has been (or is in the process of being) solved.

Litigants’ briefing has increasingly emphasized this reasoning. In *Kimel*, only one of the five briefs (including amicus curiae briefs) challenging the legislation discussed state provisions in detail.³³ The *Garrett* docket contained two briefs (out of a total of eight for the petitioner) that discussed state

28. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 & n.* (2000).

29. *Id.* at 91-92.

30. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 n.5 (2001).

31. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 750 (2003) (Kennedy, J., dissenting); see *id.* at 750-52.

32. *Id.* at 750, 755.

33. See Brief for Respondents at 2-3, *Kimel*, 528 U.S. 62 (No. 98-791).

remedies in any detail.³⁴ In *Hibbs*, however, five out of seven briefs discussed in detail how states were ahead of Congress.³⁵ They claimed that, given state policies, the harm was “speculat[ive]” and could not justify Section 5 action,³⁶ and that Congress should have studied the “corrective power of state . . . policies” before acting.³⁷ Thus, showing that Section 5 legislation does not displace existing state and local remedies has become increasingly important. This condition could very well become dispositive, if, as some commentators expect, Justices Scalia, Kennedy, and Thomas are joined in their concerns by Chief Justice Roberts and Justice Alito.³⁸

The state-and-local-remedies condition is of fundamental importance in the ENDA context. The rapidity with which state and local provisions have been adopted to fight sexual orientation discrimination in the workplace, combined with the fact that states and localities continue to adopt these remedies, might suggest to the Court that Congress should leave the solution to states and localities. Before 1989, only one state and the District of Columbia had a policy prohibiting discrimination against its employees based on sexual orientation.³⁹ That number rose to eleven states by 2000,⁴⁰ and since then to

34. Brief for Petitioners at 2-3, *Garrett*, 531 U.S. 356 (No. 99-1240); Brief for Hawaii et al. as Amici Curiae Supporting Petitioners at 19, *Garrett*, 531 U.S. 356 (No. 99-1240).

35. Brief for the Petitioner at 30-35, *Hibbs*, 538 U.S. 721 (No. 01-1368); Reply Brief for Petitioners at 18, *Hibbs*, 538 U.S. 721 (No. 01-1368); Brief for the State of Alabama et al. as Amici Curiae Supporting Petitioners at 5-15, *Hibbs*, 538 U.S. 721 (No. 01-1368); Brief of Pacific Legal Foundation as Amicus Curiae Supporting Petitioners at 18, *Hibbs*, 538 U.S. 721 (No. 01-1368); Petition for a Writ of Certiorari at 16-17, *Hibbs*, 538 U.S. 721 (No. 01-1368).

36. Brief of Pacific Legal Foundation as Amicus Curiae Supporting Petitioners at 18, *supra* note 35, at 1.

37. Reply Brief for Petitioners, *supra* note 35, at 18.

38. No analysis has identified the existing-remedies requirement in Section 5 jurisprudence. Thus, few have considered whether Chief Justice Roberts and Justice Alito will adopt it. However, more generally, commentators have suggested that these Justices will take a narrow view of congressional power in this area. See Christopher Banks & John Blakeman, *Chief Justice Roberts, Justice Alito, and New Federalism Jurisprudence*, 38 *PUBLIUS: THE J. OF FEDERALISM* 576, 577 (2008) (examining the records of Chief Justice Roberts and Justice Alito prior to their elevation to the Court and concluding that they will likely side with Justices Scalia and Thomas, and thus that “new federalism . . . depend[s] upon Justice . . . Kennedy’s swing vote”); see also *Chittister v. Dep’t of Cmty. & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000) (then-Judge Alito striking down provisions of the FMLA later upheld in *Hibbs*).

39. HUMAN RIGHTS CAMPAIGN, *THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS 2007-2008*, at 8 (2008), http://www.hrc.org/documents/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf.

40. *Id.*

twenty-one.⁴¹ In states that have not prohibited anti-gay discrimination, numerous cities and counties have created antidiscrimination policies.⁴² Strikingly, state and local governments are taking these steps to protect gay employees despite mobilization against gay rights in other areas: for example, twenty-nine states have outlawed same-sex marriage by constitutional amendment since 2000.⁴³ This suggests that, in spite of a generally negative attitude toward sexual minorities, states are committing themselves to the protection of these minorities in employment.

Besides raising problems for ENDA, the new requirement adds to the confusion of Section 5 doctrine. It sits uncomfortably with the existing-evidence-collection requirement. If the Court allows Congress to act only when limited state or local remedies exist, but at the same time requires Congress to show evidence of past state discrimination, Congress would be placed in a catch-22. In collecting evidence of discrimination, Congress and scholars generally only document recorded complaints of discrimination. These records generally will exist only if individuals file official complaints, which they usually have reason to do only if they know that their state or local governments prohibit discrimination. But if this prohibition exists, the Court may then consider congressional legislation unnecessary.

Moreover, the new requirement adds to the opacity that already characterizes Section 5 doctrine, the underlying justification for which has always been somewhat unclear. *Boerne*, which prevented Congress from reinterpreting constitutional rights, could be read as simply underscoring the constitutional position of the Court as the final arbiter of those rights. The Court's claim to this position has a venerable history.

However, the origins of the evidence-collection requirement are somewhat mysterious. Grounding the requirement in text is unavailing. Section 5 speaks of Congress's "power to enforce," not merely to remedy violations of the amendment's provisions.⁴⁴ The *Kimel* Court suggested that precedent dictates the requirement, and cited back to *Boerne*; however, *Boerne* merely prohibits Congress from *expanding* a constitutional right. Where rights *do* exist, nothing in *Boerne* suggests that Congress could not legislate to protect the rights from state infringement, whether or not it had evidence that the rights were being

41. HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES (2010), http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf.

42. HUMAN RIGHTS CAMPAIGN, *supra* note 39, at 8.

43. HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2010), http://www.hrc.org/documents/marriage_prohibitions_2009.pdf.

44. U.S. CONST. amend. XIV, § 5.

violated. In fact, the *Boerne* Court referred to Section 5 powers as “preventive” nine times in its opinion.⁴⁵ Further historical analysis of this requirement is beyond the scope of this Comment.⁴⁶ However, *Boerne* by itself suggests that through its preventive power, Congress could subject states to suits to prevent violations “[r]egardless of the state of the record,”⁴⁷ whether or not Congress had evidence of unconstitutional state conduct.

Some commentators have suggested that the Court is trying to effect an institutional alteration of power through its evidence-collection requirement. They argue that the Court has borrowed this requirement from administrative law: Section 5 review is seen as analogous to review of agency action for “arbitrary and capricious” behavior under the Administrative Procedure Act (APA), where the Court reviews the agency record.⁴⁸ Thus, the doctrine is actually a means for the Court to alter Congress’s role into that of a quasi-administrative agency. Commentators proceed to criticize the doctrine based on this conclusion. Yet, if this is true, it is unclear why the Court specifically requires Congress to document a pattern of existing violations. After all, agencies need not show evidence of statutory violations before creating a rule. Similarly, administrative review under the APA’s arbitrary and capricious standard involves many other requirements, such as a demonstration of responsiveness to publicly solicited comments, which the Court has not imported into the Section 5 context.

Finally, when it meets the Court’s new tendency to examine existing remedies, the administrative analogy founders completely. No court decision that I have found has ever struck down an agency regulation because the regulatees were successfully self-regulating. Analysis and criticism of Section 5 doctrine, therefore, cannot be based on the claim that the Court is simply demoting Congress to the status of a quasi-administrative agency.

45. *City of Boerne v. Flores*, 521 U.S. 507 *passim* (1997).

46. One potential source for this requirement is Justice Black’s opinion, announcing the judgment of the Court in *Oregon v. Mitchell*, 400 U.S. 112, 130 (1970), which required both that Congress make “legislative findings” providing “substantial evidence” that “States . . . disenfranchise[d] voters on account of race,” and that Section 5 legislation be tied to the elimination of such discrimination. However, Justice Black wrote only for himself.

47. *Boerne*, 521 U.S. at 532.

48. See, e.g., A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001).

III.A RATIONALE AND A COUNTERARGUMENT

Robert Post and Reva Siegel have provided an alternative rationale for the Court's doctrine. They have suggested that by banning Congress from altering the judicial recognition of rights and by requiring rigorous evidence collection, the Court has imposed limitations on Congress that are drawn from the context of the courtroom.⁴⁹ Similarly, I argue that instead of relying on the administrative law analogy, a more convincing account of the new existing-remedies requirement can be drawn from the mootness doctrine of self-restraint that courts impose on themselves. This doctrine requires courts to restrict their activity to situations in which there is an actual case or controversy. Should the controversy end due to a change in circumstances, the court's decision would be without actual, direct effect. In one well-known case, *DeFunis v. Odegaard*, a student who had been ordered admitted to the University of Washington School of Law after challenging its affirmative action policy was close to graduation by the time his appeal reached the Supreme Court.⁵⁰ The Court explained that since there was little chance that the student would fail to finish his degree even if he were to lose his appeal, the case had become moot.

Commentators are generally in agreement that the doctrinal intricacies of mootness cannot be based solely on the text of Article III. The "case or controversy" language, as Justice Scalia has noted, has "virtually no meaning except by reference to [a common law] tradition" that places restrictions on

49. Post and Siegel are critical of this development. While the full scope of their criticism is beyond the scope of this Comment, the point most relevant to my analysis is roughly as follows. Under *Boerne*, the right that Congress can grant individuals is limited to protection from *irrational* discrimination. This is inappropriate: rational basis review may force courts to defer to the rationality of state action in many cases in which discrimination was actually invidious, because of the judiciary's institutional limitations. However, it makes no sense to force this deference upon Congress. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 464-69 (2000); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1970-71 (2003). Second, the evidence-collection requirement means that judicial factfinding and evidentiary requirements have inappropriately been applied to congressional proceedings. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 13 (2003) ("[W]hat lends Garrett's logic its cloak of plausibility is the implicit evocation of a judicial paradigm of evidentiary relevance."); see *id.* at 7-17 (making the point more fully).

50. 416 U.S. 312, 316 (1974).

judicial power.⁵¹ (Justice Scalia goes on to add, however, that the judicial application of this historically constructed limitation is still constitutionally required.) According to some, therefore, the doctrine has been developed and embellished based on a vision of separation of powers. Courts (and, for that matter, commentators) begin with an idea of the “role” judges should play in a case and accordingly develop the metes and bounds of the doctrine.⁵² Thus, some suggest, the mootness doctrine floats free of the text of Article III: it can be seen as a general doctrine of restraint designed to allow an institution or branch of government to act only as long as a problem that the institution has been designed to solve exists.

Just as a vision of horizontal separation of powers between departments of government animates the mootness doctrine, a vision of vertical separation of powers between the federal and state governments animates Section 5 doctrine. Congress’s ability to strip states of their sovereign immunity is limited at the outset to only those cases where it has evidence of violations, just as a judicial role is restricted to actual cases or controversies. Similarly, this congressional ability survives only as long as the violations are ongoing.

Understanding the Court’s rationale in this manner opens up the possibility of a counterargument, also based on Article III rationales. The mootness doctrine is subject to an exception. A case does not become moot simply because defendants voluntarily cease their activity; rather, in the case of voluntary cessation, a case becomes moot only if “subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”⁵³ This doctrine’s roots are drawn from *United States v. Trans-Missouri Freight Ass’n*, an 1897 antitrust case in which the Court was faced with a request for an injunction to dissolve a cartel and prevent future collusion. The defendants dissolved on their own, then argued that this dissolution rendered the case moot. The Court, however, explained that should the case be considered moot, “the relief granted [would not be] adequate to the

51. *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting); see also Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 623-25, 637 (1992) (calling for the “deconstitutionalization of mootness”).

52. Lee, *supra* note 51; see also Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 565-66 (2009) (noting that mootness doctrine is partially prudential); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490 (1996) (“Until 1964, . . . the Court treated mootness not as an Article III requirement but as an equitable determination. . . . [M]ootness is, and always has been, a matter of discretion” rather than mandated by the Constitution.) The idea of the institutional role of courts is developed based on constitutional text and broader sociopolitical values.

53. *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968).

occasion.”⁵⁴ The defendants’ response was deficient in at least two ways: first, they had not proved that their actions would not recur. Further, voluntary dissolution did not provide as sufficient a remedy as an injunction, which would prohibit future collusion as well.⁵⁵ The reasoning behind the voluntary cessation exception to the mootness doctrine has largely remained the same since *Trans-Missouri*.

The exception remains relevant in the case of enactments, at least at the municipal level. In *City of Mesquite v. Aladdin’s Castle, Inc.*, the trial court found a city ordinance void for vagueness. During the appeal process, the city repealed the vague language.⁵⁶ The Supreme Court explained that “the city’s repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court’s judgment were vacated” as moot.⁵⁷ Hence, the court of appeals did not err in judging the case on its merits.⁵⁸ The Court recently restated this point in the equal protection context. Faced with a school desegregation program in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court explained that because of the voluntary cessation exception, the voluntary pause of a desegregation plan in one of the defendant districts did not render the case moot.⁵⁹

Thus, just as judicial remedies are restricted to live controversies, the Court might well decide that Congress should be able to create sovereignty-stripping remedies only when state violations are ongoing. However, as in the mootness context, voluntary cessation would remain problematic. *Trans-Missouri Freight*’s analysis helps us recognize why leaving the solution to existing state legislation might not solve the problem. Just as court-ordered remedies for the plaintiffs in *Trans-Missouri Freight* went beyond the remedy provided by defendants’ voluntary cartel dissolution, by ensuring that the cartel would not re-form, so too might congressional legislation provide remedies that go beyond those available under existing, anemic state enforcement mechanisms.

ENDA raises exactly these concerns, as the remedies that states currently provide are anemic, and indeed, are subject to repeal. The Williams Institute notes that of the few cities and counties that responded to its survey, two incorrectly referred employee complaints regarding discrimination to the

54. 166 U.S. 290, 308 (1897).

55. See *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

56. 455 U.S. 283 (1982).

57. *Id.* at 289.

58. See also *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993) (citing *City of Mesquite*).

59. 551 U.S. 701, 719 (2007).

EEOC (which has no federal mandate to address them).⁶⁰ One respondent was unaware of its own antidiscrimination provisions, another did not know what enforcement mechanisms were in place, and several lacked the resources to provide data or handle complaints.⁶¹ Similarly, local provisions often have lower caps on damages, lack compensation for attorney's fees, or fail to protect discrimination based on perceived orientation.⁶² Executive orders prohibiting discrimination fail to create a private cause of action and are not always backed up by investigative mechanisms.⁶³ Courts have also found that some localities' provisions are preempted by federal law.⁶⁴ Thus, only Congress can pass a bill that would definitively prevent localities' discrimination.

More important is the fact that local laws provide no guarantee against future discrimination. Justice Kennedy's reasoning can be expanded in ways that cause concern. If Congress cannot act when state laws prohibit discrimination, it may not be allowed to act where all that exists is a stated policy against discrimination (which does not provide for a cause of action), or even where no complaints of discrimination have been filed against a municipality in a given year (which may suggest that the problem of discrimination has ended). Voluntary state action—be it the enactment of statutes or cessation of discrimination—is not a guarantee against future discrimination.

Furthermore, even ordinances and statutes are subject to repeal, as was the ordinance in *City of Mesquite*. The most prominent example is a constitutional amendment enacted by the people of Colorado that overturned the local ordinances of various Colorado cities and counties prohibiting LGB discrimination in employment.⁶⁵ Similarly, the private employment protections adopted by Cincinnati's city council in 1992 were revoked by a public vote in 1993; the Sixth Circuit upheld that vote.⁶⁶ There have been other efforts to

60. WILLIAMS INST., *Executive Summary of DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 11-12* (2009), available at http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports_ENDA.html.

61. *Id.* at 12.

62. *Id.* at 16.

63. *Id.*

64. See *Air Transp. Ass'n of Am. v. City of S.F.*, 992 F. Supp. 1149 (N.D. Cal. 1998) (invalidating a domestic partnership benefits ordinance because federal law preempts localities from regulating the air traffic system); *Council of N.Y. v. Bloomberg*, 846 N.E.2d 433 (N.Y. 2006) (state and federal law preempts a benefits ordinance).

65. "Amendment 2," as it was called when presented to voters in Colorado, was ultimately invalidated by the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996).

66. *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

overturn ordinances, or elements of ordinances, in the last few years through litigation. While many have been unsuccessful,⁶⁷ several have succeeded.⁶⁸ Finally, constitutional amendment initiatives to repeal gay rights legislation suggest that antidiscrimination provisions are still in danger. Most successful constitutional amendments have targeted same-sex marriage.⁶⁹ However, some opponents of ENDA use antimarriage rhetoric to target antidiscrimination provisions, arguing that these provisions are the stepping stone to “gay marriage, [and] married couple benefits.”⁷⁰ As a result, it is altogether foreseeable that successful antimarriage efforts might spill over into the employment discrimination context, resulting in the repeal of local antidiscrimination provisions.

As such, the congressional remedy in ENDA goes further than those of states by creating robust reporting and recording mechanisms.⁷¹ But more importantly, even if states have voluntarily ceased discrimination, this should not be dispositive: as with mootness doctrine, Congress should be able to act in these cases of voluntary cessation to protect against future rights violations.

CONCLUSION

Even though Congress has compiled evidence of anti-gay discrimination, existing state law provisions that protect gays against employment discrimination may be fatal to ENDA. Understanding the rationale behind Section 5 restraints as analogous to those underlying Article III restraints

67. See, e.g., *Hyman v. City of Louisville*, 53 Fed. App'x 740 (6th Cir. 2002); *S.D. Myers, Inc. v. City & Cnty. of S.F.*, 253 F.3d 461 (9th Cir. 2001); *Heinsma v. City of Vancouver*, 29 P.3d 709 (Wash. 2001); see also *Marriage & Partnership Litigation Notes: Louisiana—New Orleans*, 2004 LESBIAN/GAY L. NOTES 100-01 (discussing an unpublished case from the Louisiana courts).

68. See *supra* note 64.

69. See *supra* note 43.

70. ENDA: THREATENS CHRISTIANS & BUSINESS OWNERS, TRADITIONAL VALUES COALITION, <http://www.traditionalvalues.org/modules.php?sid=3753#> (last visited Oct. 7, 2010); see also Thomas Messner, THE HERITAGE FOUND., *Executive Summary of ENDA AND THE PATH TO SAME-SEX MARRIAGE*, <http://www.heritage.org/Research/Reports/2009/09/Executive-Summary-ENDA-and-the-Path-to-Same-Sex-Marriage> (“[L]aws like ENDA have already proved to be an important step toward legal recognition for homosexual unions in several states”); *Issues: Marriage*, LIBERTY INST., <http://freemarket.org/issues.php?category=7&article=8> (last visited Oct. 7, 2010) (“ENDA . . . is one of the gravest threats to . . . traditional marriage today.”).

71. Cf. *Nevada v. Hibbs*, 538 U.S. 721, 735 (2003) (upholding FMLA provisions after finding congressional remedies superior to those of states).

SECTION 5 CONSTRAINTS ON CONGRESS

provides activists with new and helpful ways to explain to courts the need for the state-suit provisions of ENDA. It also raises interesting questions of the institutional competencies of Congress versus those of courts, as well as interesting questions of federal-state relations, all of which are ripe for further analysis.

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