
RECENT PROPOSED LEGISLATION

EMPLOYMENT DISCRIMINATION — CONGRESS CONSIDERS BILL TO PROHIBIT EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY. — Employment Nondiscrimination Act of 2009, H.R. 3017, 111th Cong. (2009).

Section 5 of the Fourteenth Amendment¹ empowers Congress to enact legislation that “deters or remedies constitutional violations.”² Recently, Congress has begun to consider exercising its section 5 power to pass a piece of antidiscrimination legislation. If enacted into law, the Employment Nondiscrimination Act of 2009³ (ENDA) would prohibit the states, as well as other employers, from discriminating against their employees on the basis of sexual orientation and gender identity.⁴ If the Supreme Court, in turn, takes a case that requires it to determine whether sexual orientation or gender identity is a suspect classification, it should consider ENDA, if enacted into law, as one factor that weighs in favor of an affirmative answer.

Although no federal statute expressly proscribes employment discrimination on the basis of sexual orientation or gender identity, over the last several decades lesbian, gay, bisexual, and transgender (LGBT) employees have litigated claims of employment discrimination in the federal courts.⁵ These claims have been premised on the idea that, in light of several antidiscrimination principles, sexual orientation and gender identity discrimination are both forms of sex discrimination and thus prohibited under Title VII of the Civil Rights Act of 1964.⁶ First, in the analogous context of race-based employment discrimination, courts have concluded that race discrimination occurs when an employer takes an adverse action against an employee because it objects to the race of a person with whom the employee associates, intimately or otherwise.⁷ Given that the race and sex discrimination pro-

¹ U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].”).

² *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

³ H.R. 3017, 111th Cong. (2009).

⁴ *See id.* § 4(a)(1). In prohibiting private employers from discriminating on the basis of sexual orientation and gender identity, Congress would be exercising its power to regulate interstate commerce. *See id.* § 2(3).

⁵ *See, e.g., Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (gay employee); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (transgender employee).

⁶ 42 U.S.C. §§ 2000e to 2000e-17 (2006); *see id.* § 2000e-2(a) (“It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s . . . sex . . .”).

⁷ *See, e.g., Floyd v. Amite County Sch. Dist.*, 581 F.3d 244, 249–50 (5th Cir. 2009); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513 (6th Cir. 2009); *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004); *Parr v. Woodmen of*

visions of Title VII are to be construed in the same fashion,⁸ the prescription of associational discrimination can fairly be said to apply in the latter context — that is, an employer should not be allowed to discriminate against an employee simply because it believes that the employee seeks intimate relationships with individuals of the “wrong” sex.⁹ Sexual orientation discrimination can thus be viewed as sex-based associational discrimination and prohibited under Title VII.

Second, transgender discrimination can also be said to be a form of sex discrimination. As one court has explained, it is indisputable that, in the analogous context of religious discrimination, an employer who terminates an employee because she has converted or intends to convert from one religion to another has run afoul of Title VII’s prohibition on religious discrimination.¹⁰ In light of this bar against transitional discrimination,¹¹ the sex discrimination provision of Title VII can also fairly be said to prohibit an employer from taking an adverse employment action against an employee simply because it objects to the fact that the employee has transitioned or intends to transition from one gender to another.¹²

Finally, the Supreme Court held in *Price Waterhouse v. Hopkins*¹³ that the sex discrimination provision of Title VII prohibits employers from discriminating against employees who do not conform to gender stereotypes.¹⁴ LGB individuals, by definition, do not conform to the stereotype that biological males are sexually attracted only to biological females and vice versa.¹⁵ And transgender individuals, by definition, do not conform to the stereotype that biological males perceive or

the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986); cf. *Loving v. Virginia*, 388 U.S. 1, 8–11 (1967) (concluding that a ban on interracial marriage discriminated on the basis of race).

⁸ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) (plurality opinion).

⁹ See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994); Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 3–4, (1992); cf. *Baehr v. Lewin*, 852 P.2d 44, 59–63 (Haw. 1993) (plurality opinion) (concluding that a ban on same-sex marriage discriminated on the basis of sex).

¹⁰ See *Schroer*, 577 F. Supp. 2d at 306.

¹¹ For more on transitional discrimination, see Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 670–71 (2009).

¹² See *Schroer*, 577 F. Supp. 2d at 306–08; Glazer & Kramer, *supra* note 11, at 671.

¹³ 490 U.S. 228.

¹⁴ See *id.* at 251 (plurality opinion) (“[W]e are beyond the day when an employer could evaluate employees by . . . insisting that they matched the stereotype associated with their group.”); see also *id.* at 266, 272 (O’Connor, J., concurring in the judgment) (noting that, by demonstrating that “her failure to conform to the stereotypes . . . had been a substantial factor,” in precipitating the adverse employment action, *id.* at 272, the plaintiff had made “a strong showing that the employer ha[d] done exactly what Title VII forbids,” *id.* at 266).

¹⁵ See, e.g., Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196; see also I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1187 (1991).

present themselves as male or that biological females perceive or present themselves as female.¹⁶ When employers discriminate against LGBT individuals because of their sexual orientation or gender identity, the employers can be said to be discriminating against LGBT individuals because of their nonconformity with these gender stereotypes.

Although the sex discrimination provision of Title VII can thus be interpreted to prohibit sexual orientation and transgender discrimination, the lower federal courts have largely been reluctant to do so. Rather than applying the principles of associational and transitional discrimination to the sex discrimination provision of Title VII, courts have pointed to the absence of relevant and affirmative congressional intent and concluded that Title VII does not prohibit discrimination on the basis of either sexual orientation¹⁷ or gender identity.¹⁸ And while *Price Waterhouse* has led some courts to permit sex stereotyping claims by LGBT employees,¹⁹ other courts have refused to do so.²⁰ As a result, LGBT employees — including those employed by state governments — remain largely vulnerable at the workplace.²¹ Their sex-

¹⁶ See, e.g., Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 582 (2007).

¹⁷ Several circuits have discerned the lack of such an intent from the legislative history of the sex discrimination provision of Title VII and from Congress's subsequent failure to pass legislation that would explicitly designate sexual orientation as a protected characteristic. See *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979), *overruled on other grounds by Nichols v. Azteca Rest. Enters.*, 256 F.3d 864 (9th Cir. 2001); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326–27 (5th Cir. 1978). Other circuits have summarily relied on these circuits' decisions in concluding that Title VII does not prohibit sexual orientation discrimination. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764–65 (6th Cir. 2006); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).

¹⁸ See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749–50 (8th Cir. 1982); cf. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (relying on the “plain language” of Title VII to conclude that transgender discrimination is not prohibited). The U.S. District Court for the District of Columbia is the only federal court to have recognized that transgender discrimination is transitional discrimination on the basis of sex. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008).

¹⁹ See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290–92 (3d Cir. 2009); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572–75 (6th Cir. 2004); *Nichols*, 256 F.3d at 874–75; *Schroer*, 577 F. Supp. 2d at 303–06; *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 659–60 (S.D. Tex. 2008).

²⁰ See, e.g., *Etsitty*, 502 F.3d at 1224–25; *Vickers*, 453 F.3d at 762–65; *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (“[A] gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII.’” (quoting *Simonton*, 232 F.3d at 38)); *Spearman*, 231 F.3d at 1085–86.

²¹ In addition to the absence of definitive protection at the federal level, the majority of states have yet to prohibit employment discrimination on the basis of sexual orientation and gender identity. See *Employment Non-Discrimination Act: Ensuring Opportunity for All Americans: Hearing Before the S. Comm. on Health, Education, Labor & Pensions*, 111th Cong. 3 (2009)

ual orientation and gender identity, alone, can cause them to be terminated and thereby suffer the devastating consequences of job loss.²²

Introduced in the House of Representatives by Representative Barney Frank on June 24, 2009, ENDA would change this situation by “provid[ing] a comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation or gender identity.”²³ The chief provision of ENDA would make it unlawful for most employers covered by Title VII, including the states,²⁴ to “fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual . . . because of such individual’s actual or perceived sexual orientation or gender identity.”²⁵ ENDA would also prohibit employers from retaliating against employees who exercise their rights under the Act.²⁶ ENDA’s enforcement mechanisms and remedies would largely be the same as those of Title VII.²⁷

While ENDA would help to ensure equal employment opportunities for LGBT people, its significance should transcend the realm of employment and reach the domain of equal protection analysis. Thus far, the Supreme Court has not determined whether sexual orientation is a suspect classification,²⁸ even though it has strongly suggested that

(statement of Thomas E. Perez, Ass’t Att’y Gen., Dep’t of Justice, Civil Rights Div.), available at <http://help.senate.gov/imo/media/doc/Perez.pdf>. Moreover, in their own employment practices, states themselves have engaged in sexual orientation and gender identity discrimination. See Williams Inst., UCLA Sch. of Law, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports_ENDA.html (last visited Mar. 27, 2010).

²² See, e.g., H.G. KAUFMAN, PROFESSIONALS IN SEARCH OF WORK 53 (1982) (“[T]he degree of stress created by job loss is comparable to that of other losses in life, such as divorce and the death of a spouse or a close friend.”).

²³ H.R. 3017 § 2(2). ENDA was introduced in the Senate on August 5, 2009 by Senator Jeff Merkley. S. 1584, 111th Cong. (2009). Previous versions of ENDA, which would have prohibited discrimination on the basis of sexual orientation but not gender identity, have been introduced in every Congress since the 103rd Congress, with the exception of the 109th Congress. See Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1, 9–12 (2009).

²⁴ See H.R. 3017 § 3(a)(4)(A) (adopting the definition of “employer” from Title VII). ENDA would not apply to religious institutions that may discriminate on the basis of religion under Title VII. See *id.* § 6.

²⁵ *Id.* § 4(a)(1). Several limitations distinguish ENDA from Title VII. For instance, ENDA would not impose disparate impact liability. Compare *id.* § 4(g), with 42 U.S.C. § 2000e-2(k) (2006).

²⁶ See H.R. 3017 § 5.

²⁷ See *id.* § 10(a)(1), (6); see also *id.* § 10(b)(1). ENDA would allow employees to seek damages from state governments. See *id.* § 11(a) (expressly abrogating state sovereign immunity under the Eleventh Amendment).

²⁸ The Court in *Romer v. Evans*, 517 U.S. 620 (1996), did not determine whether sexual orientation is a suspect classification, for it found that the measure at issue failed rational basis review. See *id.* at 635. And in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court chose to resolve the case on substantive due process grounds rather than equal protection grounds. See *id.* at 574–75.

discrimination against LGB individuals is problematic.²⁹ And the Court has yet to decide a case involving the rights of transgender individuals. If the Court does take a case that requires it to determine whether sexual orientation or gender identity is a suspect classification,³⁰ it should consider ENDA, if enacted into law,³¹ as one factor that weighs in favor of an affirmative answer.

The Court has properly recognized the importance of according respect to Congress's constitutional determinations.³² As the Court has explained, "Congress, like [the] Court, is bound by and swears an oath to uphold the Constitution."³³ Congress, in other words, has the capacity to discern, and to apply, the Constitution's basic commands.³⁴ Moreover, as the Court has observed, Congress is a "representative branch of our Government."³⁵ Its constitutional determinations may

²⁹ In *Romer*, the Court concluded that a state's bare desire "to make [lesbian, gay, and bisexual individuals] unequal to everyone else" is an illegitimate governmental interest. 517 U.S. at 635. Meanwhile, in *Lawrence*, the Court expressed its understanding that its decision to invalidate a statute criminalizing same-sex sodomy would advance the equality of lesbian, gay, and bisexual individuals. See 539 U.S. at 575 ("When homosexual conduct is made criminal . . . , that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."); see also *id.* (noting that a due process decision would advance the interest of lesbian, gay, and bisexual individuals in "[e]quality of treatment").

³⁰ The Court could be asked to determine whether sexual orientation or gender identity is a suspect classification in a case concerning a federal or state measure that discriminates on the basis of sexual orientation or gender identity or in a case concerning ENDA's abrogation of state sovereign immunity. In both contexts, the Court could resolve the case without reaching the question of suspect classification. First, the Court could find that the discrimination that is engendered in a federal or state measure or that is targeted by ENDA reflects only irrational prejudice and thus cannot withstand rational basis review. Cf. *Romer*, 517 U.S. at 635. Second, the Court could conclude that sexual orientation and gender identity discrimination are forms of sex discrimination. Cf. sources cited *supra* notes 9–16. If the Court were to resolve a case in either of these ways, it would not have to make the analytical move suggested here.

³¹ The mere failure of Congress to enact ENDA would not necessarily indicate that it does not view sexual orientation and gender identity as suspect classifications. Indeed, Congress may fail to enact legislation for reasons entirely unrelated to the substance of the proposed statute — for instance, "Congress may have other more pressing business or simply want to adjourn." WILLIAM D. POPKIN, MATERIALS ON LEGISLATION 680 (5th ed. 2009).

³² See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989) (noting that the Court "owe[s] some deference to Congress' judgment after it has given careful consideration to the constitutionality of a legislative provision"); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61 (1982) (plurality opinion) (noting that Congress's consideration of an act's constitutionality is a "reason to respect the congressional conclusion"); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("The customary deference accorded the judgments of Congress is certainly appropriate when . . . Congress specifically considered the question of the Act's constitutionality.").

³³ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); accord *Rostker*, 453 U.S. at 64 (noting that "Members [of Congress] take the same oath we do to uphold the Constitution of the United States").

³⁴ See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution . . .").

³⁵ *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985).

thus embody an important measure of democratic legitimacy.³⁶ Given that “public confidence” is “essential” to the Court’s own authority,³⁷ the Court has reason to consider it appropriate to accord respect to Congress’s perspective on the Constitution.

This respect ought to be heightened when it comes to the constitutional determinations that Congress makes in enacting legislation under section 5 of the Fourteenth Amendment.³⁸ As the Court has recognized, section 5 specifically empowers Congress to enact legislation that “deters or remedies” state violations of the Constitution’s due process and equal protection guarantees.³⁹ To exercise this power, Congress must, in the first instance, “make its own informed judgment on the meaning” of those provisions.⁴⁰ Section 5 legislation thus likely embodies Congress’s most “carefully considered”⁴¹ view and its most “deliberate judgment”⁴² regarding the scope of individual rights under the Constitution. It is via section 5 legislation that Congress speaks most authoritatively on that subject.⁴³ To be sure, if the Court has already resolved a particular question, the principle of *stare decisis* may

³⁶ See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970) (Harlan, J., concurring in part and dissenting in part) (noting that the “distinction between Congress and the Court . . . is that Congress, being an elective body, presumptively has popular authority for the value judgment it makes”); see also *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment) (noting that Congress is “the branch of our Government most responsive to the popular will”).

³⁷ *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring); accord *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority — possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction.”).

³⁸ Thus, the Court should give more weight to ENDA if it is enacted into law than to statutes such as the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)), and the Don’t Ask, Don’t Tell Policy (DADT), 10 U.S.C. § 654 (2006). Apart from the fact that the Court should consider section 5 legislation to be more significant than Article I legislation, the Court should give more weight to more recent legislation if it is to ensure that its decisions “reflect the evolving constitutional culture of the country.” 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, 1951 (2003). ENDA, if it is enacted into law, would be a more recent law than DOMA and DADT, and it would thus express Congress’s more current perspective on sexual orientation discrimination.

³⁹ *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

⁴⁰ *Id.* at 535. In contrast, to enact legislation under Article I, Congress need not determine, in the first instance, the substance of the Constitution’s equal protection or due process guarantees. See, e.g., Paul Brest, *Congress as Constitutional Decisionmaker and Its Power To Counter Judicial Doctrine*, 21 GA. L. REV. 57, 68–69 (1986); Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power To “Say What the Law Is,”* 59 WASH. & LEE L. REV. 839, 892 (2002).

⁴¹ *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 319 (1985).

⁴² *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality opinion).

⁴³ See, e.g., Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 41 (2003) (suggesting that section 5 legislation may be the most authoritative form of nonjudicial interpretation of the Constitution and that, in exercising its section 5 power, “Congress is on virtually equal footing with the Court”).

require that the Court's prior determination remain in effect.⁴⁴ But with respect to a question of first impression, the aforementioned considerations indicate that the Court should give some weight to Congress's view on that issue, as embodied in section 5 legislation.

The plurality's analysis in *Frontiero v. Richardson*⁴⁵ reflects this idea. In that case, the plurality took note of Title VII, as amended in 1972,⁴⁶ in considering whether sex is a suspect classification,⁴⁷ a question that the Court had not previously addressed.⁴⁸ Relying in part on that statute, the plurality inferred that "Congress itself has concluded that classifications based upon sex are inherently invidious,"⁴⁹ and it noted that this determination was "not without significance."⁵⁰ The plurality thus gave weight to the view that Congress had expressed via section 5 legislation.⁵¹

⁴⁴ See *Boerne*, 521 U.S. at 536. Thus, in *City of Boerne v. Flores*, 521 U.S. 507, the Court could not accord respect to the constitutional determinations that Congress had made in enacting the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by Boerne*, 521 U.S. 507, because they contravened the Court's prior decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). See *Boerne*, 521 U.S. at 515. Similarly, in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court refused to defer to Congress's implicit determination that individuals with disabilities constitute a suspect class. Compare *id.* at 365-68, with Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(7), 104 Stat. 327, 329 (repealed 2008). The Court instead adhered to its prior decision in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), which had held that such individuals do not constitute a suspect class. See *Garrett*, 531 U.S. at 366-68 (discussing *Cleburne*). The Court noted that Congress could not "rewrite the Fourteenth Amendment law laid down by [the] Court in *Cleburne*." *Id.* at 374. While these cases may be interpreted to mean that the Court will give no weight to the constitutional views that Congress expresses in enacting section 5 legislation, see, e.g., Post & Siegel, *supra* note 38, at 1953 (reading *Boerne* to indicate that, in the Court's view, the judiciary is "the only legitimate source of authoritative constitutional meaning"), they may be more properly read as narrower decisions that give effect to the principle of stare decisis. In neither of these cases did the Court indicate that in determining a question of first impression, it would not accord respect to Congress by considering its perspective on that question. As previously noted, the Court has not determined whether sexual orientation or gender identity is a suspect classification. See *supra* notes 28-29.

⁴⁵ 411 U.S. 677 (1973).

⁴⁶ In 1972, Congress invoked its section 5 power to make Title VII of the Civil Rights Act of 1964 applicable to the states, thereby prohibiting them from discriminating against their employees on the basis of sex. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-49, 453 n.9 (1976).

⁴⁷ See *Frontiero*, 411 U.S. at 687-88 (plurality opinion).

⁴⁸ Previously, in *Reed v. Reed*, 404 U.S. 71 (1971), the Court had applied rational basis review to a sex-based classification, but it did not reject the idea that heightened scrutiny would be more appropriate. See *id.* at 76.

⁴⁹ *Frontiero*, 411 U.S. at 687 (plurality opinion).

⁵⁰ *Id.* at 688.

⁵¹ The analysis in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), in which the Court held that age is not a suspect classification, see *id.* at 313, is not to the contrary. Although Congress had extended the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (2006), to the states in 1974, see *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 68 (2000), the *Murgia* Court may have assumed that for legislation to be deemed an exercise of section 5 power, Congress must indicate that the legislation is meant to enforce the Fourteenth Amendment. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 15-16 (1981); *id.* at

If the Court takes a case that requires it to determine whether sexual orientation or gender identity is a suspect classification, it should consider ENDA, if it becomes law, to be similarly significant. To be sure, by enacting ENDA, Congress could simply be adhering to the idea that sexual orientation and gender identity discrimination may reflect only irrational prejudice and thus cannot survive rational basis review.⁵² But ENDA would more likely reflect the emerging perspective that these types of discrimination are presumptively unconstitutional. Indeed, the Supreme Court has been more willing to sustain abrogations of state sovereign immunity in employment discrimination statutes that address suspect or quasi-suspect classifications.⁵³ In light of this judicial landscape, Congress's decision to enact ENDA, and to abrogate state sovereign immunity thereunder, would more likely evince the view that sexual orientation and gender identity are suspect classifications. Thus, if it becomes law, ENDA should weigh in favor of finding that sexual orientation and gender identity are suspect classifications.⁵⁴

In sum, while ENDA would help to ensure equal employment opportunities for LGBT people, its significance should transcend the realm of employment and reach the domain of equal protection.

35–36 (White, J., dissenting). The absence of the ADEA from the analysis in *Murgia* indicates that the Court at that time may not have viewed the ADEA as section 5 legislation. “The 1974 ADEA amendment differs from the 1972 Title VII amendments . . . in lacking explicit reference to the Fourteenth Amendment.” *EEOC v. Elrod*, 674 F.2d 601, 607–08 (7th Cir. 1982).

The analysis in *Cleburne*, which held that disability is not a suspect classification, *see* 473 U.S. 432, 442 (1985), is also not inconsistent. To be sure, by the time the Court decided *Cleburne*, it had retreated from the idea that Congress must indicate that it is enforcing the Fourteenth Amendment in order for a statute to be deemed section 5 legislation. *See* *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983). But the statutes that Congress had enacted to help individuals with disabilities either bound the federal government only or simply conditioned federal funding to the states. *See* *Cleburne*, 473 U.S. at 443; *see also* *Pennhurst*, 451 U.S. at 15–18 (concluding that the Developmentally Disabled Assistance and Bill of Rights Act was not enacted under section 5). It was not until five years after *Cleburne* was decided that Congress invoked its section 5 power to impose a nondiscrimination mandate on the states. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(4), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12101(b)(4) (2006)).

⁵² *See, e.g.,* *Romer v. Evans*, 517 U.S. 620, 635 (1996); *Quinn v. Nassau County Police Dep't*, 53 F. Supp. 2d 347, 357 (E.D.N.Y. 1999).

⁵³ *Compare* *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736–37 (2003) (sustaining the abrogation under the Family and Medical Leave Act of 1993), *and* *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447–48 (1976) (sustaining the abrogation under Title VII), *with* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360, 374 (2001) (invalidating the abrogation under Title I of the Americans with Disabilities Act of 1990), *and* *Kimel*, 528 U.S. at 67 (invalidating the abrogation under the ADEA).

⁵⁴ That the Court should take ENDA into account does not mean that it should not look to other factors, such as whether the characteristic at issue has any bearing on an individual's ability to contribute to society, *see, e.g.,* *Cleburne*, 473 U.S. at 440–41, and whether there has been a history of discrimination based on that characteristic, *see, e.g.,* *Murgia*, 427 U.S. at 313. As in *Frontiero*, the Court should first analyze those factors and then consider whether Congress has enacted relevant section 5 legislation. *See* *Frontiero*, 411 U.S. at 684–88 (plurality opinion).