THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008: A CASE STUDY OF THE NEED FOR BETTER CONGRESSIONAL RESPONSES TO FEDERALISM JURISPRUDENCE

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Abstract

The Genetic Information Nondiscrimination Act of 2008 (GINA) is the first new civil rights statute enacted since the "federalism revolution" of 1995-2001, in which the Supreme Court announced new limitations on congressional authority. Among other things, these decisions invalidated civil rights remedies against states, declaring that Congress had failed to amass sufficient evidence of the need for legislation. Although passed in the shadow of these decisions, GINA's limited legislative history makes it vulnerable to attack – potentially limiting its protections for millions of state employees. States will likely attack GINA on two grounds: first, that Congress relied only on its commerce power, and not its Fourteenth Amendment remedial power; and second, that Congress failed to identify a sufficient threat to constitutional rights to justify subjecting states to suit. While there are strong grounds for rejecting these challenges, that outcome is far from certain. The risk of invalidation might have been minimized had Congress developed the rationale for GINA's extension to the states more thoroughly, or alternatively, required states to waive their immunity as a condition of federal grants. These strategies are illustrated by recent proposed civil rights legislation addressing sexual orientation discrimination and racial profiling, as well as by the Voting Rights Act Reauthorization Act of 2006, which is currently before the Supreme Court. To ensure the efficacy of future civil rights legislation, Congress should consistently tailor laws to withstand federalism challenges. Future laws should expressly invoke Congress's authority and intent to create remedies against states; be accompanied by a strong and targeted legislative record; expressly require waiver of state immunity; and specifically enumerate remedies.

Introduction

In spring of 2008, more than a decade after its initial introduction, Congress passed the Genetic Information Nondiscrimination Act of 2008 (GINA) with near-

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unanimity. Designed to promote genetic research and preventive screening, safeguard medical privacy, and prevent unfair treatment of individuals based on disease-linked traits, GINA prohibits the collection and use of genetic information by employers and insurers. Like other antidiscrimination laws, GINA (which will go into effect in late 2009) applies to private and public employers alike, and enables individuals harmed by discrimination to seek damages in court. Yet because of GINA's limited legislative record, courts could severely limit the new law's provision for damages actions against states, cutting back the new law's protections for more than five million state workers.[2] Although Congress surely did not intend this result, it could almost certainly have prevented it.

The threat to GINA arises from the Supreme Court's "federalism revolution" of 1995-2001.[3] In that period, the conservative majority of the Supreme Court under Chief Justice Rehnquist took greater strides in limiting the power of Congress than at any time since the 1930s, invalidating parts of major federal laws on the basis of newly-announced constitutional rules derived from the Tenth,[4] Eleventh and Fourteenth Amendments[5] and the Commerce Clause,[6] and purportedly intended to preserve an appropriate balance of state and federal power. Notable among these were decisions in 2000 and 2001 holding that two landmark civil rights laws, the Age Discrimination in Employment Act (ADEA)

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[2] *See* U.S. CENSUS BUREAU, STATE GOVERNMENT EMPLOYMENT DATA: MARCH 2007 (2009), *available at* http://ftp2.census.gov/govs/apes/07stus.txt (showing nearly 3.8 million full-time employees and more than 1.4 million part-time employees at that time).
[3] *See, e.g.*, Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 30 (2001).
[4] *See* Printz v. United States, 521 U.S. 898 (1997).
[5] See discussion *infra* Part I.
[6] *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

and the Americans with Disabilities Act (ADA), were unconstitutional insofar as they provided damages remedies against state employers.[7]

At the beginning of the Roberts Court era, the full implications of these Rehnquist Court federalism decisions are uncertain, and are being litigated extensively in the lower courts.[8] The Court's most recent decisions in these areas rejected challenges to Congressional power,[9] but most were decided on narrow grounds.[10] Notably, in 2004 and 2006, the Court permitted enforcement of the ADA against states in very specific classes of cases, leaving undecided the question of whether the ADA's application to public services and programs is within Congress's Fourteenth Amendment power in the majority of cases.[11] At the same time, the Court has indicated it may limit rights and remedies under a variety of laws enacted under Congress's spending power.[12]

These Rehnquist and Roberts Court federalism decisions create standards against which any major new Congressional action is likely to be judged. Regardless of which party controls the political branches, these judicial constraints remain, and could limit the effectiveness of not only existing laws but future legislation as well. Ironically, even as the Supreme Court places less reliance on legislative history in *interpreting* statutes than

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[7] See discussion *infra* Part I.

[8] *See, e.g.*, Rochelle Bobroff, *Scorched Earth and Fertile Ground*, 2007 CLEARINGHOUSE REV. 298 (discussing lower court treatment of the ADA); Tanya K. Shunnara, *Reaction to* Raich*: The Commerce Clause Counter-Revolution*, 37 CUMB. L. REV. 575 (2007) (discussing lower court treatment of Commerce Clause decisions).

[9] The 2005 decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), which upheld federal regulation of the intrastate production of drugs under the Controlled Substances Act, is seen by some as a retreat from sweeping dicta in the Rehnquist Court's earlier Commerce Clause decisions. *See, e.g.*, Lino A. Graglia, Lopez, Morrison & Raich: *Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL'Y 761 (2008); Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DEPAUL L. REV. 1 (2006).

[10] *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) (upholding liability of states under bankruptcy laws).

[11] *See* discussion *infra* Part I.

[12] *See* discussion *infra* Part III.

in the past,[13] it has given exacting scrutiny to such history in interpreting Congress's *power to enact* laws, in effect "regularly check[ing] Congress's homework."[14] As the first new civil rights law enacted since the Court's "federalism revolution" began[15], the possibility of a federalism challenge to GINA illustrates the continuing challenge this jurisprudence poses for Congress.

Part I of this Article summarizes in relevant detail the Rehnquist Court's splintered, fact-bound and often contradictory decisions on Congress's power to protect constitutional rights under Section 5 the Fourteenth Amendment, including its authority to subject states to private actions for damages. Part II asks how GINA stacks up under these precedents, concluding that GINA's damages remedy may be vulnerable to attack in suits against states. State will argue that the legislative record supporting GINA, and particularly its prohibition on employment discrimination, is insufficient to comport with the Court's precedents. Damages against states are most likely to be upheld in GINA suits that seek to protect medical privacy rights, or deter race or gender discrimination.

To some extent, the Supreme Court may have doomed GINA's application to states by creating constitutional rules that render it difficult, perhaps impossible, for Congress to respond to emerging threats to constitutional rights. At the same time, it is clear that Congress did not do all it could to ensure that GINA's remedies would be upheld. Part III compares GINA to three other recent pieces of legislation that illustrate more deliberate responses to the Court's rulings. In the Voting Rights Act

[13] *See, e.g.*, James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 133-38 (2008).
[14] Tennessee v. Lane, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting).
[15] While the Voting Rights Act Reauthorization Act of 2006, discussed *infra* Part III, was the first significant civil rights law to follow the 1990s federalism cases, GINA is the first since that time to create new private causes of action, including against states. Prior to GINA, the most recent laws to create new equal employment rights were the Family and Medical Leave Act of 1993, discussed *infra* Part I, and the Uniformed Services Employment and Reemployment Rights Act of 1994.

Reauthorization Act of 2006 – the constitutionality of which is currently before the Supreme Court – Congress conducted extensive fact-finding to justify the legislation. The proposed End Racial Profiling Act takes a similar approach, with statutory findings that specifically justify regulation of state governments in the name of a variety of constitutional rights. A different approach is illustrated by the proposed Employment Non-Discrimination Act, which would require states to waive their immunity from claims of sexual orientation discrimination in order to remain eligible for federal grants. These comparisons show that Congress has been inconsistent in addressing the impact of the Court's rulings, giving them careful attention in drafting some legislation -- particularly high-priority or controversial legislation – but little attention in other legislation such as GINA.

Part IV concludes by suggesting how lawmakers can respond more effectively to the Court's federalism jurisprudence. Congress (and policy advocates) should consistently take the Court's rulings into account when crafting new civil rights legislation, by (1) expressly invoking Congress's authority and intent to create remedies against states; (2) developing a strong legislative record that focuses on threats to constitutional rights; (3) laying out arguments for why legislation is needed and complies with the Court's precedents; (4) expressly requiring waiver of state immunity in exchange for federal funds; and (5) specifically enumerating individual remedies. Because even these steps may not always be adequate, however, Congress should also use its oversight and confirmation powers and other means to promote a judicial approach that gives more respect to the constitutional authority and prerogatives of Congress.

I. The Supreme Court's Section Five Jurisprudence

The Intersection of the § 5 Power and Sovereign Immunity

The constitutional questions facing GINA arise from the intersection of two of the Court's federalism doctrines. The first is state "sovereign immunity" under the Eleventh Amendment, which the Rehnquist Court interpreted expansively as a general bar to damages suits against states.[16] In 1996, the Court's five most conservative justices held – overruling a six-year-old precedent – that Congress cannot use its commerce power, or its other Article I powers, to abrogate states' sovereign immunity.[17] The same majority later held that this immunity extends to all claims for damages, in both federal and state court as well as in federal agency proceedings.[18] The four dissenters characterized this approach to sovereign immunity as a "shocking…affront to a coequal branch of our Government,"[19] and one without basis in precedent or the constitutional design.[20] While this immunity does not bar injunctive relief, the elimination of damages remedies – such as back pay for illegal firings – erodes a law's remedial and deterrent effects.[21]

The second relevant doctrine is the Rehnquist Court's restrictive interpretation of Congress's authority to protect constitutional rights under section 5 of the Fourteenth

[16] The Eleventh Amendment provides that states cannot be sued in federal court by citizens of other states or foreign countries. U.S. Const. Am. XI. But the Rehnquist majority held that "the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." Alden v. Maine, 527 U.S. 356, 728-29 (1999).

[17] Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996), *overruling* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989). *See also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (rejecting Patent Clause as basis for abrogation); *but see* Central Va. Comm. Coll. v. Katz, 546 U.S. 356 (2006) (recognizing Bankruptcy Clause as a narrow exception). The *Seminole Tribe* majority consisted of Chief Justice Rehnquist, the recently-appointed Justice Thomas, and Justices O'Connor, Kennedy and Scalia. Prior to these decisions, the Court had struggled for decades to define the scope of states' immunity from suit and legislative exceptions to it. *See generally* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 522-55 (3d ed. 2000).

[18] *Alden*, 527 U.S. 706; Fed. Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002).

[19] *Seminole Tribe*, 517 U.S. at 78 (Stevens, J., dissenting).

[20] *Id.* at 100-169 (Souter, J., dissenting).

[21] *See, e.g.*, Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1326 (2001) (immunity "deprives private parties of an adequate remedy at law for conceded violations of their rights"); Carlos M. Vazquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 875 (2000) (noting that availability of only prospective relief can lead to numerous, temporary violations of federal law).

Amendment.[22] The seeds of this approach lay in the Court's 1997 decision in *City of Boerne v. Flores*, which was primarily a case about the bounds of the Free Exercise Clause and Congress's power (or rather, its lack of power) to expand the substantive scope of constitutional protections.[23] *Boerne* also held, with relatively little discussion, that the Religious Freedom Restoration Act (RFRA) was not a proper use of Congress's § 5 power to remedy and deter constitutional violations. The Court stated generally that under § 5 "there must be a congruence between the means used and the ends to be achieved," and observed that Congress had not documented *any* instance of deliberate religious discrimination in state law in modern times.[24] But the "lack of support in the legislative record… [was] not RFRA's most serious shortcoming," the Court said, because in general "it is for Congress to determine the method by which it will reach a decision."[25] Rather, RFRA failed as a § 5 remedy because it was clearly intended to alter existing constitutional protections, and "not designed to identify and counteract state laws likely to be unconstitutional."[26] Despite the limited nature of the § 5 analysis in *Boerne*, however, the same five-justice majority that expanded the Court's immunity doctrine would also employ *Boerne*'s "congruence and proportionality" formulation as a sharp limitation on congressional power.[27]

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[22] In previous decades, the Supreme Court broadly construed Congress's power to remedy and deter constitutional violations under § 5 of the Fourteenth Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); Fullilove v. Klutznick, 448 U.S. 448 (1980).

[23] 521 U.S. 507, 530 (1997). That the Court did not think it was breaking new ground regarding the § 5 power is apparent from the fact that all of the four concurring and dissenting opinions in the case are focused on the substantive scope of the Religion Clauses. *Id.* at 536-67.

[24] *Id.* at 530.

[25] *Id.* at 531-32.

[26] *Id.* at 534.

[27] *See* Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 153 (2002). Regarding RFRA's successor statute, the Religious Land Use and Institutionalized Persons Act, see discussion *infra* Part III.

These two doctrines interlock, because the Court's immunity decisions left § 5 of the Fourteenth Amendment as the only basis for Congress to abrogate state sovereign immunity, [28] and thereby enable damages actions under generally-applicable civil rights laws like GINA.[29] The rest of this Part lays out the principles from recent case law under which GINA's abrogation of sovereign immunity will likely be tested. These cases have been decided by shifting majorities over fierce dissents, and display "major methodological contradictions."[30] Earlier cases appear to set up a strict test, to which later cases, decided by different majorities, arguably pay only lip service. The Court may well swing back in the other direction in the future – especially given the replacement of the swing voters in those cases by the conservative Chief Justice Roberts and Justice Alito[31] – and the Court's impending decision in *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Mukasey*, a challenge to the Voting Rights Act Reauthorization Act of 2006, presents an opportunity for the Court to do so.[32] For present purposes, I seek to synthesize these conflicting decisions, acknowledging their considerable indeterminacy and the fact that the Supreme Court may change the game yet again.[33]

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[28] Along with the similar enforcement clauses of the Thirteenth and Fifteenth Amendments.
[29] *Seminole Tribe*, 517 U.S. at 58, *citing* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). As noted *supra*, injunctive remedies are available even in the absence of abrogation. Additionally, as discussed *infra* Part III, Congress may induce states to *waive* their immunity in exchange for federal funds.
[30] Vikram David Amar, *The New "New Federalism,"* 6 GREEN BAG 349, 351 (2003).
[31] Rochelle Bobroff, The Early Roberts Court Attacks Congress's Power to Protect Civil Rights, 30 N.C. Cent. L. Rev. 231, 262 (2008); *see also* Araiza, *supra* note 66, at 88 (suggesting, prior to 2005 appointments, that whether *Lane* marks a real shift or only a temporary pause in the Court's limitations on § 5 authority will depend on changes in the Court's composition).
[32] Northwest Austin Mun. Util. Dist. No. 1 v. Mukasey, 573 F.Supp.2d 221 (D.D.C. 2008), *probable jurisdiction noted*, 129 S.Ct. 894 (2009). As discussed *infra* Part III, the case presents the question whether the 2006 reauthorization of the VRA's preclearance provisions was supported by a sufficient factual predicate.
[33] Two points of § 5 doctrine are clear and likely to stay that way: in 2006, the Court unanimously held that Congress may always provide remedies in cases involving actual constitutional violations. United States v. Georgia, 546 U.S. 151 (2006). Under *Georgia*, courts must decide "on a claim-by-claim basis" whether a

Congressional Intent and the Source of Authority for Abrogation

Before deciding whether Congress has properly employed its § 5 power to abrogate state immunity, it must be clear that Congress *intended* to abrogate immunity. The Court has said that this clear-intent rule is generally satisfied when a statute, by its plain terms, applies to state as well as non-state actors.[34] The Court has also said that Congress does not need to identify the source of constitutional authority for passing § 5 legislation.[35] Rather, it is only necessary that a court "be able to discern some legislative purpose or factual predicate that supports the exercise of that power."[36]

Yet the Court has made one statement that seemed to contradict this principle. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court refused to even consider whether a patent law was a proper use of the § 5 power to enforce the Takings Clause of the Fifth Amendment, even though the law expressly provided for suits against states.[37] Noting the absence of any mention of the Fifth Amendment in the statute or legislative history, the Court stated that because "Congress was so explicit about [relying on] its commerce power and [its power under § 5 to protect] due process guarantees as bases for the Act," Congress's failure to mention the

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violation of a purported § 5 statute would also violate the Constitution, in which case further § 5 analysis is unnecessary. *Id.* at 160. The Court is also unanimous in the view that § 5 legislation may not respond to purely private action, though it is split on whether Congress has the power to provide remedies against private actors in response to states' failure to protect them. *Compare* U.S. v. Morrison, 529 U.S. 598, 624-27 (2000), *with id.* at 663-66 (Breyer, J., dissenting).

[34] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73-74 (2000). *See also* Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (statutory text need not make "explicit reference to state sovereign immunity or the Eleventh Amendment").

[35] *See* Fullilove v. Klutznick, 448 U.S. 448, 476-478 (1980) (upholding minority business set-aside under § power in absence of recitation). *See also* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948) (the "constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise").

[36] EEOC v. Wyoming, 460 U.S. 226, 243 n. 18 (1983). The *Wyoming* Court specifically rejected the suggestion that such a recitation was required by language in *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 15 (1981) ("we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment").

[37] Fla. Prepaid, v. College Savings Bank, 527 U.S. 627, 642 n. 7 (1999).

Fifth Amendment precluded the Court from even considering it.[38] Some lower courts have read the footnote as establishing a broad rule that reliance by Congress on one or more powers to enact a law precludes the Court from upholding it on the basis of some other power.[39]

But there is good reason to read this footnote narrowly. Its briefly stated conclusion, without citation, should not likely be taken to limit or overrule long-established principles. Moreover, in the very next term after writing this footnote, the Court rejected an invitation to extend it. Asserting immunity from liability under the Age Discrimination in Employment Act, the defendant seized on the *Florida Prepaid* footnote, arguing the ADEA could not be upheld as § 5 legislation because its legislative record and statutory findings focused entirely on interstate commerce effects and did not invoke the Equal Protection Clause.[40] This argument received substantial discussion in the briefs,[41] yet the Court did not even address it in its decision in *Kimel v. Florida Board of Regents*, instead holding that the ADEA clearly sought to abrogate immunity and evaluating the statute as § 5 legislation.[42] This strongly suggests that the Court viewed *Prepaid* as distinguishable.

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[38] *Id.*

[39] *See* Chavez v. Arte Publico Press, 204 F.3d 601, 604 (5th Cir. 2000) (suggesting reliance on commerce power precludes analysis of Copyright Remedy Act under § 5); De Romero v. Inst. of Puerto Rican Culture, 466 F.Supp.2d 410, 416 (D.Puerto Rico 2006) (same); Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223, 228 n. 3 (3d. Cir. 2000) (Alito, J.) (refusing to consider Family and Medical Leave Act as remedy for due process rights in light of Congress's reliance on Equal Protection Clause).

[40] Brief for Respondents, 1999 WL 631661, 28-30.

[41] *See* Brief for Petitioners, 1999 WL 503876, 29 n.18 (stating general rule that recitals are unnecessary); Brief for United States, 1999 WL 513848, 18 n.18 (same); Reply Brief for Petitioners, 1999 WL 728345, 7-8 (characterizing footnote as reflecting a "rule of judicial deference" that "cannot…be leveraged into an affirmative judicial requirement that Congress must state the constitutional predicate of its legislation at the pain of having the courts declare the enactment unconstitutional"); Reply Brief for the United States, 1999 WL 33609325, 17 n.16 (distinguishing *Florida Prepaid* on ground that the ADEA's nature as an antidiscrimination statute).

[42] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73-74 (2000).

The best explanation for distinguishing *Prepaid* comes from the Solicitor General's brief in *Kimel*, which argued that that in *Prepaid* the Court simply deferred to Congress's statements regarding its bases for legislation because no other constitutional basis was obvious from the legislation itself. By contrast, "the connection between [an] anti-discrimination statute and the enforcement of the Equal Protection Clause is obvious."[43] This reading reconciles *Prepaid* not only with *Kimel* but with earlier case law, so that any nondiscrimination law that expressly applies to states – including GINA – may be evaluated as § 5 legislation.

Legislative Record: the Strict *Kimel*/*Garrett* Standard

Under the post-*Boerne* cases, the first step for determining the validity of § 5 legislation is whether Congress identified a sufficient threat to constitutional rights to justify a congressional response. In *Florida Prepaid*, the Court's majority indicated that Congress must identify a pattern of "widespread and persisting deprivation of constitutional rights"[44] – language *Boerne* had used to describe the basis for 1960s civil rights laws, but which were now framed as the operative § 5 standard. The Court held that the Patent Remedy Clarification Act did not meet this standard because it was enacted "in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution."[45] The Fourteenth Amendment, the Court stated, cannot be used to address such a "speculative harm."[46]

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[43] Reply Brief for the United States, 1999 WL 33609325, 17 n.16. *See also* CSX Transp., Inc. v. NY State Office of Real Prop. Servs., 306 F.3d 87, 98 (2d Cir. 2002) (abrogation under Railroad Revitalization and Regulatory Reform Act valid despite express reliance on Commerce Clause and failure to mention § 5 power, where "the discriminatory conduct that the [statute] attempts to regulate can be easily associated with Section 5 powers").
[44] Fla. Prepaid Postsecondary Educ. Expense Bd. V. Coll. Savs. Bank, 527 U.S. 627, 645 (1999).
[45] *Id.* at 646.
[46] *Id.* at 641.

The Court appeared to make this standard even stricter in *Kimel*, ignoring *Boerne*'s statement about deferring to "the method by which [Congress] will reach a decision," and closely scrutinizing the legislative record supporting the ADEA. Although this record was substantial, the Court held that § 5 legislation cannot be buttressed by a pattern of discriminatory action in the private sector. Rejecting abrogation of immunity under the ADEA, the Court declared that the fact "that Congress found substantial age discrimination in the private sector is beside the point," because "Congress made no such findings with respect to the States."[47] Similarly, in reviewing the ADA's employment discrimination provisions in *Board of Trustees of the University of Alabama v. Garrett*, the Court faulted Congress for focusing on private-sector discrimination, while producing only "half a dozen examples" of disability discrimination by states.[48] These isolated incidents, the Court held, fell "far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."[49]

These cases also refused to consider several other categories of evidence relied by Congress, rejecting as irrelevant: 1) evidence relating to the actions taken by local and federal government agencies, on the grounds that they were not relevant to abrogation of state sovereign immunity;[50] 2) evidence of state action that was not clearly unconstitutional, on the grounds that Congress lacked the power under § 5 to deter activity permitted by the Constitution;[51] 3) evidence unrelated to the specific context at issue, *e.g.*, evidence of discrimination in public services to support remedies in

[47] 528 U.S. 62, 90 (2000).
[48] 531 U.S. 356, 369 (2001).
[49] *Id.* at 370.
[50] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
[51] Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); *Garrett*, 531 U.S. 356.

employment;[52] and 4) evidence outside the Congressional record.[53] Together, these restrictions on the kinds of evidence that could support § 5 legislation suggested a dauntingly high bar: Congress could not simply establish a nationwide problem and extend a solution to public and private sectors alike; instead, it had to prove a widespread pattern of violations of a particular constitutional right by state governments in a particular context.[54]

Legislative Record: the More Flexible *Hibbs*/*Lane* Standard

In two subsequent cases, however, very different (and largely liberal/moderate) majorities of the Court would uphold § 5 legislation – at least in part – and indicate that the exacting *Kimel*/*Garrett* standard was not universally applicable.[55] In these cases, the Court emphasized that the laws at issue – or at least particular applications of them – served to protect constitutional rights such as gender equality and access to the courts, which are accorded heightened judicial protection. This heightened protection, the Court said, made it "easier for Congress to show a pattern of state constitutional violations."[56] While not expressly disagreeing with the prior cases, these cases rejected the evidentiary limitations the Court had previously applied, apparently regarding them as irrelevant in the context of more strongly-protected rights: the Court accepted evidence regarding private actors and local governments, evidence of conduct that was not clearly

[52] *Garrett*, 531 U.S. 356.
[53] *Kimel*, 528 U.S. 62; *Garrett*, 531 U.S. 356.
[54] Justice Scalia has gone further, suggesting that Congress must prove a pattern of discrimination with regard to *each* state. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 742-43 (Scalia, J., dissenting). *But see* Tennessee v. Lane, 541 U.S. 509, 537 (Ginsburg, J., concurring) (attacking this view).
[55] In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), Chief Justice Rehnquist and Justice O'Connor formed a majority with Justices Stevens, Souter, Ginsburg and Breyer, who had dissented in the prior cases. In *Tennessee v. Lane*, 541 U.S. 509 (2004), Justice O'Connor again joined the Court's four moderate-liberal justices, but Rehnquist joined the other conservatives in dissent.
[56] *Id.* at 736.

unconstitutional and that concerned discrimination in a variety of areas, and evidence not directly before Congress.[57]

Thus, in upholding the abrogation of immunity under the Family and Medical Leave Act (FMLA) in *Nevada v. Hibbs*, the Court relied primarily on a Bureau of Labor Statistics survey showing gender disparities in private-sector leave; testimony, based on a 50-state survey, that public-sector policies were similar; and gender differences in states' parental leave laws.[58] The Court also relied on historical evidence of gender discrimination by states more generally, including its own decisions. [59]

Similarly, in *Tennessee v. Lane*, the Court held that the public services provisions of the ADA "unquestionably [are] valid § 5 legislation" as they apply to "the class of cases implicating the fundamental right of access to the courts."[60] *Lane* (written by Justice Stevens) explicitly rejected "the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves" [61] – seemingly contradicting *Kimel* and *Garrett*.[62] Without distinguishing between state and local actors, the Court observed that the "overwhelming majority" of examples of disability discrimination collected by Congress related to public programs and services.[63] The Court also pointed to state laws and

[57] *Id.* at 731; *Lane*, 541 U.S. at 527; Amar, *supra* note 30, at 351.
[58] *Hibbs*, 538 U.S. at 730-32.
[59] *Id.* at 729-30. *Hibbs* dealt only with FMLA's family care provision. The Courts of Appeals addressing the issue to date have held that the FMLA's self-care provision does not validly abrogate state immunity, on the ground that they are not targeted at gender discrimination *See, e.g.*, Nelson v. Univ. of Texas at Dallas, 535 F.3d 318, 312 (5th Cir. 2008) (citing cases).
[60] 541 U.S. at 531, 533-34.
[61] *Id.* at 527 n. 16.
[62] *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001); Tennessee v. Lane, 541 U.S. 509, 542 (2004) (Rehnquist, J., dissenting).
[63] *Id.* at 526 (quoting *Garrett*, 531 U.S. at 371 n.7).

judicial decisions stretching back a century that had manifested discrimination against disabled persons in access to courts and the administration of justice.[64]

Thus, *Hibbs* and *Lane* establish that in situations where § 5 legislation protects constitutional rights afforded heightened protection, the standards Congress must follow to establish a sufficient threat to those rights are relaxed. *Hibbs* expressly distinguished *Kimel* and *Garrett* because they dealt with forms of discrimination to which the Court applies only "rational basis" review.[65] While *Boerne* and *Prepaid* involved rights accorded heightened protection (religious exercise and due process), they can also be distinguished from *Hibbs* and *Lane* because the legislative record in the earlier cases was virtually barren. Some commentators have argued that a distinction based on the level of judicial scrutiny afforded the relevant constitutional rights cannot fully explain the different evidentiary standards applied by the Court.[66] Nevertheless, most scholars accept that this is clearest way to reconcile the cases.[67]

Balancing Wrongs and Remedies

[64] *Id.* at 525.
[65] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).
[66] *See, e.g.*, Amar, *supra* note 30, at 353 ("[E]ach specific governmental action that is unconstitutional because it is irrational should count just as much as a[n] action that is unconstitutional because it fails to survive … intermediate scrutiny"); Yoni Rosenzweig, Tennessee v. Lane*: Relaxing the* Garrett *Requirements for Civil Rights Legislation*, 40 HARV. C.R.-C.L. L. REV. 301, 310 (2005) ("Given that the *Lane* Court accepts evidence of discrimination that would not [violate the constitution under any standard], it should not matter that the standard for finding a … constitutional injury is lower in this case"). *See also* William D. Araiza, *The Section 5 Power After* Tennessee v. Lane, 32 PEPP. L. REV. 39 (2004) ("Whether this … distinction can provide a durable basis for these different approaches …is an open question").
[67] *See, e.g.*, Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act After* Tennessee v. Lane, 44 HOUS. L. REV. 1, 13 (2007); Michael E. Waterstone, *Lane, Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 808 (2005); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 247 (2003). But see Araiza, *supra* note 66, at 54-55 (suggesting a distinction between *Lane* and prior cases based on the regulation of "uniquely governmental" functions). Some courts, without discussing this distinction, have appeared to apply a more liberal § 5 analysis even with regard to discrimination subject to rational-basis review. *See, e.g.*, Toledo v. Sanchez, 454 F.3d 24, 37-39 (1st Cir. 2006) (application of ADA to education).

In addition to being based on sufficient evidence of a threat to constitutional rights, remedies enacted under § 5 must be "congruent and proportional" to the problems they address.[68] *Boerne* states this as a balancing test: "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."[69] Likewise, the *Kimel* Court faulted the ADEA for "prohibiting substantially more state employment decisions and practices than would likely be held unconstitutional,"[70] but also acknowledged that "[d]ifficult and intractable problems often require powerful remedies."[71] The Court relied on this latter statement in upholding relatively broad remedies under the FMLA and Title II of the ADA[72] The analysis of the remedy is thus intertwined with the evidentiary analysis: the stronger the history of discrimination, the more robust a remedy may be. *Kimel* and *Garrett* also suggest that broader remedies may be appropriate to protect constitutional rights that call for heightened judicial review, such as freedom from race and gender discrimination.[73] Because proportionality is evaluated in relation to both the strength of the record and the nature of the right, these factors "largely determine the outcome,"[74] making it questionable whether the congruent-and-proportional test does much independent analytic work. Indeed, in every case so far

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[68] *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001).
[69] City of Boerne v. Flores, 521 U.S. 507, 530 (1997).
[70] 528 U.S. 62, 86 (2000).
[71] *Id.* at 88.
[72] *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Tennessee v. Lane, 541 U.S. 509 (2004). In *Lane*, Justice Scalia rejected the congruence and proportionality test outright as too "vague" and "flabby," contending that outside the context of race discrimination § 5 should not be held to permit anything beyond remedies for actual constitutional violations. 541 U.S. 509, 557-65 (2004) (Scalia, J., dissenting). It is ironic that Scalia's position is ostensibly based in large part on the risk of "interbranch conflict" caused by "check[ing] Congress's homework," as it is hard to see how a drastic restriction of Congress's powers by the Court would result in *less* interbranch conflict.
[73] *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000) (emphasizing rational-basis standard in finding remedies overbroad); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001) (same). While *Hibbs* and *Lane* discuss the importance of heightened scrutiny only with regard to the evidentiary analysis, they are certainly consistent with this view.
[74] Araiza, *supra* note 66, at 63.

the Supreme Court has held that a statute either meets both tests or fails both.[75] The next Part considers which outcome is most likely for GINA.

II. Analysis of GINA Employment Provisions

GINA was first introduced in 1995 in response to concerns about the misuse of information regarding individuals' possible genetic predispositions to various diseases. Proponents of the bill sought to prevent insurers from using such information to deny health care coverage, and to prevent employers from using genetic testing to weed out individuals with genetic predispositions to potentially costly conditions. Congress determined that such decisions, based on speculative fears about possible future conditions, were fundamentally unwarranted and unfair, and would lead to intrusions on workers' medical privacy.[76] Proponents were also concerned that even the possibility of genetic discrimination would deter individuals from seeking genetic testing or participating in genetic research, thereby blunting the societal benefits of this emerging technology. Numerous versions of the bill and several hearings over a dozen years culminated in GINA's final passage by votes of 414-16-1 in the House and 95-0 in the Senate.[77] GINA will go into effect in November of 2009.[78]

Under GINA, employers are generally prohibited from seeking genetic tests or family health history, and are completely prohibited from basing employment decisions

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[75] *See Kimel*, 528 U.S. 62; *Garrett*, 531 U.S. 356; *Hibbs*, 538 U.S. 721; *Lane*, 541 U.S. 509.In *Boerne*, the Court said it would find the scope of RFRA improper "[r]egardless of the state of the legislative record." 521 U.S. 507, 532 (1997). Even if this statement is taken literally, the dramatic breath and stringent requirements of RFRA suggest that the proportionality prong should have independent bite only in extreme cases.

[76] H.R. REP. NO. 110-028, Part 1 at 28.

[77] Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. __ (forthcoming 2009) (manuscript at 7-12, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342903) (summarizing history).

[78] H.R. REP. NO. 110-028, Part 1 at 8.

on such information.[79] GINA provides employees the same remedies as Title VII of the Civil Rights Act, including damages against public and private employers alike.[80] Given the Supreme Court precedents outlined above, states are likely to challenge GINA on two grounds. First, Congress failed to expressly invoke the Fourteenth Amendment to justify GINA's abrogation of immunity. Second, and perhaps most significantly, states may claim that Congress did not assemble a sufficient record of genetic discrimination, and specifically of discrimination or invasions of privacy by the states. These challenges could weaken GINA's protections for the millions of Americans employed by the states. GINA's potential vulnerability to these challenges suggests that Congress has yet to adequately grapple with the § 5 jurisprudence of the last decade.

Failure to Invoke the Section 5 Power

While GINA does not include any express language regarding the abrogation of state sovereign immunity, the Supreme Court held in *Kimel* that Congress's intent to subject states to federal jurisdiction is sufficiently clear where the statute clearly applies to the states.[81] Congress clearly intended to apply GINA to the states, because its employment provisions define both "employee" and "employer" to encompass state employment.[82] As discussed above, however, *Florida Prepaid* raises questions about the Congress's identification of the *source* of its authority for abrogation. The House reports on GINA cite the Commerce Clause as providing authority for the legislation.[83] As

[79] 42 U.S.C. § 2000ff, 2000ff-1. Title I of GINA adds these protections to several existing statutes to provide protections in the area of insurance. *See* H.R. REP. NO. 110-28, Part 1, at 14; Roberts, *supra* note 77, at 12-13.
[80] 42 U.S.C. § 2000ff-6.
[81] Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).
[82] 42 U.S.C. §§ 2000ff(2)(A)(ii), 2000ff(2)(B)(ii).
[83] H.R. REP. NO 110-028, Part 1 at 23. One committee report also identifies the Spending Clause as a basis for GINA, [need cite], apparently based on the statute's appropriation of funds to create a commission to study whether a "disparate impact" provision should be added. 42 U.S.C. § 2000ff-7(b), (f). While

already discussed, however, the Court has repeatedly rejected the Commerce Clause and other Article I powers as bases for abrogating sovereign immunity.[84] That leaves § 5 of the Fourteenth Amendment as a possible basis for GINA's application to the states. The legislative history of GINA does not expressly mention the Fourteenth Amendment mentioned as a basis for its enactment. However, the reports do contain passing references indicating that genetic discrimination may violate the Fourteenth Amendment.[85]

Accordingly, the key question will be whether the *Prepaid* footnote precludes reliance on § 5 to uphold GINA.[86] If the footnote is read as establishing a strict rule that reliance on one congressional power and failure to mention another is determinative, there can be no abrogation under GINA. I have suggested, however, that the footnote should be read narrowly since it was implicitly distinguished in *Kimel*. As an antidiscrimination statute, GINA has an obvious connection with equal protection. It also has an obvious connection with the fundamental right to medical privacy.[87] Thus, while the overbroad interpretations of some lower courts would jeopardize GINA's abrogation of immunity, the better view is that failure to expressly invoke the Fourteenth Amendment creates no problem here. GINA's sparse legislative record, however, creates another, more serious hurdle.

Congress can condition federal funding on a *waiver* of state immunity as a condition for receipt of federal funds (as discussed *infra*, Part III), GINA does not contain such a condition.

[84] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627 (1999); Cent. Va. Cmty v. Katz, 546 U.S. 356 (2006).

[85] Pub. L. 110-233 § 2(2) (noting that state sterilization laws have been modified to comply with Fourteenth Amendment); S. Rep. 110-48, at 9 (quoting judicial holding that genetic testing implicates Fourteenth Amendment). *Compare* Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of Univ. Sys. of Georgia, 2008 WL 1805439 (M.D.Ga. 2008) (suggesting a discussion of § 5 power in committee report may suffice to invoke that power for the Copyright Remedy Act, even though report went on to focus on commerce power as basis for that Act).

[86] *See* discussion *supra* Part I.

[87] *See* discussion *infra*.

Weakness of the Legislative Record

The Rights Protected by GINA

Before evaluating the evidence assembled by Congress, it is important to identify the constitutional rights that GINA, through its application to state employers, protects. As discussed *supra*, the identification of constitutional rights entitled to heightened judicial review was crucial to recent cases upholding abrogation of sovereign immunity.

Genetic discrimination. The most obvious right protected by GINA is the right, under the Equal Protection Clause, to be free from discrimination on the basis of genetic information. While there is no Equal Protection case law on discrimination based on genetic information, there are substantial reasons for applying heightened judicial protection to discrimination on the basis of genetic information.[88] Similar to suspect or quasi-suspect characteristics such as race, national origin and gender, possession of a particular gene, such as one that predisposes one to disease, is clearly an "immutable, or distinguishing characteristic."[89] Such genetic information by itself also "bears no relation to ability to perform or contribute to society."[90] Possession of particular genetic marker may indicate a *possibility* of *future* physical or mental impairment, but at present it is a mere piece of probabilistic data, subject both to chance and, in some cases, individual

[88] *See* Jack M. Balkin, *How New Genetic Technologies Will Transform* Roe v. Wade, 56 EMORY L.J. 843, 860 (2007); Shannyn C. Riba, *The Use of Genetic Information in Health Insurance: Who Will Be Helped, Who Will Be Harmed and Possible Long-Term Effects*, 16 S. CAL. REV. L. & SOC. JUST. 469, 484-86 (2007); Kristie E. Deyerle, *Genetic Testing in the Workplace: Employer Dream, Employee Nightmare – Legislative Regulation in the United States and the Federal Republic of Germany*, 18 COMP. LAB. L.J. 547, 560-62 (1997); George P Smith, II & Thaddeus J. Burns, *Genetic Determinism or Genetic Discrimination*, 11 J. CONTEMP. HEALTH L. & POL'Y 23, 43-46 (1994). *But see* Roberts, *supra* note 77, at 52; Colin S. Diver & Jane Maslow Cohen, *Genophobia: What Is Wrong with Genetic Discrimination?*, 149 U. PA. L. REV. 1439, 1475-81 (2001). Notably, in passing GINA Congress did not attempt to argue that genetic predisposition resembles suspect or quasi-suspect classifications.

[89] Lyng v. Castillo, 477 U.S. 635 (1986).

[90] Deyerle, *supra* note 88 at 561, *quoting* Frontiero v. Richardson, 411 U.S. 677, 687 (1973).

health and lifestyle choices.[91] Like gender-based distinctions, decisions based on genetic predisposition may sometimes be legitimate, but are likely to more often be the result of unreasoned fears or prejudices.[92] Because perceptions of genetic risks may be overblown, genetic discrimination could readily "have the effect of invidiously relegating the entire class of [individuals with a particular genetic marker] to inferior legal status without regard to the actual capabilities of its individual members."[93] If genetic discrimination is subject to some form of heightened scrutiny, GINA's ban on discrimination should be subject to the more liberal analytic framework employed in *Hibbs* and *Lane*.

On the other hand, courts might analogize discrimination based on genetic information to age and disability cases, which are subject only to rational basis review. In refusing to treat mental retardation as a suspect classification, the Supreme Court said that "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement,… the Equal Protection Clause requires only a rational means to serve a legitimate end."[94] *Kimel* and *Garrett* relied on this reasoning to hold that age and disability discrimination are subject only to rational basis review.[95] While genetic markers do not affect current capabilities, they may indicate a risk of future impairment. This risk itself is relevant to some legitimate state

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[91] *See, e.g.*, Gabrielle Kohlmeier, *The Risky Business of Lifestyle Genetic Testing: Protecting Against Harmful Disclosure of Genetic Information*, 2007 UCLA J. L. & TECH. 5, 8-15 (2007) (discussing risks posed by disclosure of information regarding genetic variations linked to diet and lifestyle); Lee M. Silver, *The Meaning of Genes and "Genetic Rights,"* 40 JURIMETRICS J. 9, 17-18 (1999) (discussing risk of discrimination based on genetic predisposition to addiction despite individuals' ability to overcome such tendencies).

[92] *Cf.* United States v. Virginia, 518 U.S. 515, 533-34 (1996) (noting that physical differences based on gender must be recognized, but may not be used to reinforce social inferiority).

[93] *Frontiero*, 411 U.S. at 687.

[94] Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445 (1985). *See also id.* at 440 (heightened scrutiny is appropriate for characteristics that are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy").

[95] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 366 (2001).

interests, including the state's interest in minimizing the potential costs (in the form of diminished performance, leaves of absence, and health care) of future illness among state employees. Thus, much may depend on courts' assessment of how often genes are likely to be relevant to state actions, and how often they will be irrelevant. Because there is as yet no long history of discrimination based on genes as such (nor could there be), courts may refuse to apply heightened scrutiny.[96] If courts hold that genetic discrimination is subject only to rational-basis review, the strict analysis of the *Kimel* and *Garrett* decisions is likely to guide their treatment of GINA's employment discrimination provision.

Privacy. GINA also protects other interests in addition to equal protection. Whereas § 202(a) of GINA prohibits the discriminatory use of genetic information, § 202(b) prohibits employers from requesting, requiring, or purchasing that information, with few exceptions. Restricting the *acquisition* of genetic information certainly furthers the goal of preventing discriminatory use, but it also protects constitutional privacy rights, which call for more searching judicial review of state conduct. In *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, the Ninth Circuit held that forced genetic testing of employees could violate both the Fourth Amendment and the Due Process Clause.[97] Although this is the only reported case precisely on point, there is a judicial consensus that the constitutional right to privacy extends to medical testing as well as the privacy of medical information generally,[98] including results of past tests,[99] and to

[96] *See* Diver & Cohen, *supra* note 88, at 1476-77; *cf. also Virginia*, 518 U.S. at 531 ("Today's skeptical scrutiny of official action … based on sex responds to volumes of history"). There is much more to be said on both sides of this constitutional question. The point here is that the outcome is as yet uncertain.
[97] Norman-Bloodsaw v. Lawrence, 135 F.3d 1260, 1269 (9th Cir. 1998).
[98] *See, e.g.*, U.S. v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) ("There can be no question that an employee's medical records… are well within the ambit of materials entitled to privacy protection");

government acquisition of medical information from third parties.[100] Thus, the full scope of GINA's privacy provision implicates the core constitutional right to privacy. Because, unlike the discrimination provision, GINA's privacy provision clearly implicates constitutional privacy rights that are subject to robust judicial protection under current precedents, it must be analyzed under the more liberal § 5 standard of *Hibbs* and *Lane* rather than *Kimel* and *Garrett*. As the rest of this section shows, this more liberal standard means that GINA's privacy provision is more likely to survive constitutional challenge.

Race and gender. Congress noted in its findings that because "many genetic conditions and disorders are associated with particular racial and ethnic groups and gender… members of a particular group may be stigmatized or discriminated against as a result of that genetic information."[101] Title VII of the Civil Rights Act already places some limits on employer decisions regarding medical information; for example, *Lawrence Berkeley Laboratory* held that Title VII prohibits screening black employees for sickle-cell anemia trait.[102] GINA supplements that protection by providing a broad ban on such screening that is not subject to the Title VII defense of business necessity.[103] To some extent, then, both of GINA's employment provisions may be justified as a response to race and gender discrimination, and benefit thereby from the more liberal

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Lankford v. City of Hobart, 27 F.3d 477, 487 (10th Cir. 1994) (rejecting qualified immunity for seizure of medical records).

[99] *See, e.g.*, Doe v. City of New York, 15 F.3d 264 (2d Cir. 1994) ("Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition").

[100] *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 599 (1977) (recognizing that state's acquisition of all prescriptions written for certain drugs implicates privacy right).

[101] Pub. L. 110-233 § 2(3).

[102] *Norman-Bloodsaw*, 135 F.3d 1260, 1272 (9th Cir. 1998). It also prohibits the use of medical testing and medical information if it has a disparate impact based on race or gender. *See* Melinda B. Kaufmann, *Genetic Discrimination in the Workplace: An Overview of Existing Protections*, 30 LOY. U. CHI. L.J. 393, 424 (1999). *Cf. Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795 (8th Cir. 1993).

[103] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (establishing business necessity defense for Title VII disparate-impact claims).

framework of *Hibbs* and *Lane*.[104] To date, the Supreme Court has always upheld § 5 legislation that combats race or gender discrimination by the states.[105] While these important rights are not implicated by most applications of GINA, the Court's recent decisions have indicated a preference for piecemeal analysis of § 5 legislation, according to the constitutional rights implicated.[106] Accordingly, an analysis focused on race and gender discrimination should benefit GINA with respect to the limited classes of cases that implicate those concerns.[107]

Policy goals. While protecting equality and privacy were major justifications for GINA's employment provisions, equally important to Congress were concerns about scientific research and public health.[108] Most of the evidence offered to support GINA relates not to actual discrimination, but to problems caused by public *fears* of discrimination. The committee reports cite studies showing that many Americans are concerned about losing jobs or insurance as a result of genetic testing, and that these fears may lead them to avoid seeking genetic testing or participating in genetic research.[109] This is a classic Commerce Clause rationale.[110] Since this kind of evidence does nothing

[104] GINA's employment provisions specifically excludes from coverage "information about the sex or age of any individual." 42 U.S.C. § 2000ff(4)(C). By its terms, however, this exclusion does not extend to genetic characteristics that are merely correlated with sex.
[105] See South Carolina v. Katzenbach, 383 U.S. 301 (1966); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003). *See also* Tennessee v. Lane, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) (§ 5 laws targeting race discrimination need only comply with Necessary and Proper Clause).
[106] *Lane*, 541 U.S. 509; *Georgia*, 546 U.S. 15.
[107] Similarly, under *Georgia*, GINA's abrogation of sovereign immunity will be valid in cases presenting actual violations of constitutional rights, whether under the right to privacy or equal protection. *Georgia*, 546 U.S. 151.
[108] *See* Roberts, *supra* note 77, at 32-35.
[109] H.R. REP. NO. 110-28 Part 1, at 28-29; S. REP. NO. 110-48, at 6-7; Slaughter Testimony at 3; Rothenberg Testimony, at 3 (citing and discussing studies).
[110] *Compare* EEOC v. Wyoming, 460 U.S. 226 (1983) (ADEA valid commerce legislation based on economic effects), *with*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (ADEA invalid under § 5); *see also* United States v. Morrison, 529 U.S. 598 (2000).

to establish a threat of violations of constitutional rights, there is no reason to expect courts to give it any weight with regard to abrogating sovereign immunity.

Analysis under the *Kimel*/*Garrett* standard

As discussed above, states will argue that genetic discrimination is subject only to rational basis review and, accordingly, that courts should subject § 202(a) of GINA to the exacting evidentiary standard of *Kimel* and *Garrett*. If analyzed under these precedents, GINA may be held invalid as applied to the states.[111] Under *Kimel* and *Garrett*, most of the evidence collected by Congress would likely be deemed "beside the point" and disregarded because it concerns discrimination in the private sector, and does not establish a pattern of unconstitutional discrimination *by the states themselves*.[112] The studies and reports cited in the record either exclusively describe private-sector activity, or fail to differentiate between public and private employment.[113] The record does include the case of Lawrence Berkeley Laboratory, a state-operated facility which was successfully sued for subjecting African-American employees to mandatory medical testing over several years.[114] Although this is clearly *an* example of unconstitutional use of genetic information in state employment, it is only a single case.

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[111] *Accord*, Roberts, *supra* note 77, at 52.
[112] *Kimel*, 528 U.S. 62.
[113] *See* S. REP. NO. 100-48, at 7; Slaughter testimony (describing surveys of employers by the American Management Association); Lisa Geller et al., *Individual, Family and Societal Dimensions of Genetic Discrimination: A Case Study Analysis*, 2-1 SCIENCE & ENGINEERING ETHICS 71 (1996); J.C. Fletcher & D.C. Wertz, *Refusal of Employment or Insurance*, abstract for presentation made at Annual Meeting of the Am. Soc. of Hum. Genet. (Baltimore, Nov. 1, 1997), *cited in* Office of Tech. Assessment, *Genetic Monitoring and Screening in the Workplace* , OTA-BA-455 (1989), *and discussed in* H.R. REP. NO. 110-28 Part 3, at 27. The Wertz/Fletcher study is more fully described in DOROTHY C. WERTZ & JOHN C. FLETCHER, GENETIC & ETHICS IN GLOBAL PERSPECTIVE 68-71 (2004). Of the two academic studies cited by Congress, one gives no indication of the types of employers reported to have engaged in discrimination, beyond stating that most were in "working-class occupations." The Geller study is not a survey but a qualitative analysis of case studies. It does not specify how many participants reported discrimination in employment as opposed to other areas, let alone in public versus private employment.
[114] The case settled after the Ninth Circuit held that nonconsensual medical testing implicated the constitutional right to privacy, and that singling out Black employees for sickle-cell anemia testing was also

This leaves the two *historical* episodes of state discrimination noted by Congress, neither of which concerned employment: laws permitting sterilization of people with disabilities, and mandatory sickle-cell screening in the 1970s. [115] The sterilization laws were raised in *Garrett*, and the Court dismissed them in a footnote, saying only that "there is no indication that any State had persisted in requiring such harsh measures as of 1990 when the ADA was adopted."[116] Accordingly, courts can be expected to give the evidence of the sterilization laws little, if any, weight. Mandatory sickle-cell testing, too, has long since been discontinued. If this historical evidence cannot be linked with evidence of *contemporary* discrimination in the record, then GINA's legislative record may be deemed too weak to support the abrogation of sovereign immunity.[117] In sum, GINA's record is comparable to the bodies of evidence rejected by the Court in *Kimel* and *Garrett*: it consists primarily of private-sector and historical evidence, with only a handful of contemporary examples of discrimination by states.[118] Under the *Kimel*/*Garrett* standard – which states will argue is the applicable standard – most of the evidence gathered by Congress is irrelevant, and what little is left is clearly insufficient.

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a form of race discrimination under Title VII of the Civil Rights Act (regardless of whether test results were used against the employee). 135 F.3d 1260, 1269-72 (9th Cir. 1998).The court rejected claims under the ADA. *Id.* at 1273. This case was decided prior to *Florida Prepaid*, *Kimel* and *Garrett*, and the defendants apparently did not assert sovereign immunity.

[115] Pub. L. 110-233 §§ 2(2)-(3).

[116] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369 n.6 (2001).

[117] An additional gap in the record is Congress's failure to identify any specific shortcomings in available state law remedies. While Congress expressly found that the "existing patchwork" of state laws is "confusing and inadequate to protect [Americans] from discrimination," Pub. L. 110-233 § 2(5), the record contains no evidence to support this contention with respect to state employment laws. The only specific shortcomings of state law discussed in the record relate to the insurance field, and particularly to federal preemption in that field. H.R. REP. NO. 110-28 Part 1, at 30; H.R. REP. NO. 110-28 Part 3, at 28. *See also* S. REP. NO. 110-48, at 12. But the failure to specifically address state employment laws, at least, should not be a major obstacle. While noting the existence of state laws, *Kimel* and *Garrett* did not rely on them, or specifically demand evidence of their inadequacy. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); *Garrett*, 531 U.S. 356.

[118] In fact GINA is weaker, but in respects that appear to be irrelevant under the standards applied in *Kimel* and *Garrett*. See discussion *infra*.

Analysis under *Hibbs* and *Lane*

A different picture is presented under the more liberal framework of *Hibbs* and *Lane*, though the result is by no means assured. If courts apply the analysis of *Hibbs* and *Lane* – as they should with respect to, at a minimum, GINA's privacy provision, and the class of discrimination cases implicating race and sex equality concerns – the evidence amassed by Congress should be enough to support application to the states. The record included recent surveys by the American Management Association which, like the Bureau of Labor Statistics study relied on by the Court in *Hibbs*, showed the existence of a significant, current problem of invasions of genetic privacy in the private sector.[119] Specifically, they show that a distinct minority of employers seek genetic information about applicants and employees. While less than one in twenty employers in these surveys engaged in testing for specific genetic conditions, the survey also found that one in five employers sought family medical history,[120] which is prohibited under GINA to the extent that it includes "the manifestation of a disease or disorder in family members of such individual."[121] A pair of mid-1990s academic studies also provide some evidence of this problem, despite some methodological shortcomings.[122] Additionally, the record

[119] *But see* Patricia Nemeth & Terry W. Bonnette, *Genetic Discrimination in Employment*, 88-JAN MICH. B.J. 42, 44 (2009) (characterizing record as showing "a dearth of evidence that genetic information discrimination was a widespread problem").

[120] Additionally, most employers who tested for genetic traits said they used that information in personnel decisions, as did a substantial fraction who asked about family medical history. S. REP. No. 100-48, at 7 (describing 2000 survey); Slaughter testimony (describing 2001 survey).

[121] 42 U.S.C. § 2000ff(4)(A)(iii).

[122] The Wertz/Fletcher study found that "almost all" examples of what patients at genetics clinics described as discrimination in both employment and insurance involved symptomatic conditions or were otherwise "characteristic of broad general employment practice…or general insurance practice….None of the patients' reports pointed to specifically 'genetic' discrimination," in the sense of being based solely on carrier status or predisposition. Although data from medical professionals and the public did indicate that genetic discrimination in employment "exists," the authors concluded that it was "rare." WERTZ & FLETCHER, *supra* note 112, at 69-70. The Geller study is actually an analysis of case studies gathered from interviews; the authors emphasized that it was "not a survey," had a low response rate, and that "any statistical analysis of the cases would be inappropriate." The authors provided a breakdown of reports by

contains evidence, particularly in a 1989 report by the Office of Technology Assessment, that genetic screening by employers has been a continuing phenomenon since the 1970s, and has included some of the nation's largest employers.[123] The legislative record also included several individual stories of discrimination, including two handled by the Equal Employment Opportunity Commission.[124]

Although the GINA record contains only a few instances of *recent* state violations,[125] the Court's precedents nowhere demand a certain number of recent constitutional violations by states. More importantly, they do not say that recent actions are the only kind of evidence relevant to § 5 analysis. While the cases since *Boerne* have focused heavily on recent evidence of constitutional violations by states, the Court has never said that this is the only kind of acceptable factual predicate for § 5 legislation.[126] Each of the post-*Boerne* cases involved new congressional responses to longstanding problems; nothing in them mandates that Congress wait years for conclusive proof that past violations are being perpetuated through innovative means.[127] Rather, the Court, through its reliance on pre-*Boerne* decisions, "has recognized that Congress has utilized a

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type of genetic condition, but did not specify how many reports related to employment. Geller et al., *supra* note 112, at 83, 88. Finally, both studies relied on self-reports and provided little to no detail about the cases, with one noting that it was "difficult to determine to what extent reports of genetic discrimination are of actual rather than perceived discrimination." *Id.* at 83. If this collection of "anecdotal" evidence constituted the only or the primary evidence supporting abrogation, these shortcomings could be very problematic. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001); Tennessee v. Lane, 541 U.S. 509, 542 (2004) (Rehnquist, C.J., dissenting). In light of the other, stronger evidence of private-sector use of genetic information, however, these studies simply add a modicum of support to the record.

[123] Office of Tech. Assessment, *Genetic Monitoring and Screening in the Workplace*, OTA-BA-455 (1989), *cited in* S. REP. No. 100-48, at 7.

[124] *See* Roberts, *supra* note 77 at 27-28. One case, settled by the EEOC, involved systematic testing of employees. *See* S. REP. No. 110-48, at 9.

[125] These include the Lawrence Berkeley Laboratory case, as well as reports in the academic studies of instances of discrimination based on family genetic history in education and state adoption services. Geller, et al., *supra* note 112 at 77-78.

[126] Mark A. Posner, *Time Is Still On Its Side*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 99 (2007).

[127] *Cf.* Johnson v. Florida, 405 F.3d 1214, 1244 (11th Cir. 2005) (Wilson, J., dissenting in part) (arguing Congress was not constrained to extend Voting Rights Act coverage only to particular forms of discrimination it had documented, because "[i]f this were the standard, states would always have one free bite at the apple").

variety of approaches when establishing the historical predicate for enacting prophylactic legislation."[128] Notably, the Court's first modern § 5 decision, upholding the language-discrimination section of the Voting Rights Act, stated that Congress has the authority to assess "the *risk or pervasiveness* of the discrimination" by state actors."[129]

Consider the reauthorization of the preclearance provisions of the Voting Rights Act.[130] The existence of the VRA preclearance provisions for four decades has effectively prevented and deterred much discrimination, making it more difficult to prove that its requirements are still needed.[131] Congress's rationale for periodic reauthorization therefore has begun with the long history of unconstitutional discrimination, and "then appropriately [sought] to link those violations to the present day through what Congress has concluded is a continuing special risk of discriminatory decision making engendered by those violations."[132] The Court embraced this approach in *City of Rome v. United States*, in which the pre-*Boerne* Court upheld the 1975 VRA extension.[133] *Rome* primarily relied not on evidence of recent constitutional violations but on the evidence of frequent preclearance denials for voting changes that would have a disparate impact on minorities, which cumulatively indicated the risk that purposeful discrimination would recur without

[128] Posner, *supra* note 125, at 99.
[129] Katzenbach v. Morgan, 384 U.S. 641, 653 (1966). *Kimel* even notes that review of legislative history is itself only "[o]ne means" of evaluating § 5 remedies, suggesting that these cases' focus on recent state violations is not exclusive. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000).
[130] The preclearance provisions, otherwise known as (the other) Section 5, provide for mandatory federal review of all changes in election procedures in certain jurisdictions with a history of pervasive voting discrimination. See 42 U.S.C. § 1973c (2000).
[131] *See*, *e.g.*, Karlan, supra note 67, at 20-27; Nathan Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE. L.J. 174, 191-207 (2007).
[132] Posner, *supra* note 125, at 100. *Cf. also* Ass'n for Disabled Americans v. Fla. Int'l Univ., 405 F.3d 954, 959 (11th Cir. 2005) (holding with regard to the ADA that "[i]n light of the long history of state discrimination against students with disabilities, Congress reasonably concluded that there was a substantial risk for future discrimination").
[133] City of Rome v. United States, 446 U.S. 156, 180-82 (1980); Posner, *supra* note 125, at 101.

an extension.[134] Thus, *Rome* stands for a principle of "historical predicate flexibility," unchanged by subsequent cases.[135] Under this principle, at least when protecting fundamental rights Congress may rely not only on a recent pattern of constitutional violations, but alternatively on other evidence, both recent and older, that establishes a special risk that historical violations are likely to be perpetuated.[136]

Like the VRA, GINA presents a "unique constitutional quandary,"[137] and as with the VRA, "it is the problem of time that lies at the heart of the constitutional question."[138] The VRA's time problem arises from the fact that the passage of time and the effectiveness of the law itself have both served to lessen a historically severe problem. GINA presents the flip-side of this problem: rapid technological developments have enabled previously impossible forms of discrimination. A sensible extension of *Rome*'s flexible approach would be that, where the passage of time has resulted in the emergence of qualitatively new or vastly expanded opportunities for invasion of constitutional rights; where the problem is proven to exist in the private sector; and where states engaged in analogous violations in the past, the threshold for recent evidence should be relatively modest.

Under this view, GINA's abrogation of immunity could and should be upheld. It is only in recent years that scientists have discovered genetic links to a wide variety of medical conditions, and that accurate and affordable testing for a wide variety of traits

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[134] *Rome*, 446 U.S. at 180-82. Posner also describes how earlier decisions upholding aspects of the VRA employed a similar "historical predicate flexibility." *Supra* note 125 at 99-100.
[135] *See* Posner, supra note 125, at 99-100. Earlier decisions upholding parts of the VRA displayed a similar flexibility. *See id.*
[136] Consistent with this approach, the district court in the current VRA challenge looked to both the past record and "the risk of future constitutional harm." Northwest Austin Mun. Util. Dist. No. 1 v. Mukasey, 573 F.Supp.2d 221, 269 (D.D.C. 2008).
[137] Persily, *supra* note 130, at 192.
[138] Posner, *supra* note 125, at 94.

has become available.[139] Opportunities for scrutiny of workers' possible genetic predispositions were far fewer even a decade ago, when most of the research in the record was conducted.[140] Given the emergent nature of the problem (and the relatively small fraction of American jobs located in state governments), it might have been impossible for Congress to uncover a large body of evidence regarding use of genetic information by state employers. Yet the evidence Congress did assemble suggests that states are not likely to be exempt from the practices of the private sector. Congress enacted the National Sickle Cell Anemia Control Act of 1972 to halt states' use of mandatory sickle-cell testing – precisely the sort of invasion of medical privacy that GINA prohibits by state employers.[141] Despite the 1972 Act, the aforementioned Lawrence Berkeley Laboratory case revealed a years-long pattern of coerced sickle cell testing.[142] Recognizing the risk that these practices would multiply rapidly in the coming years, GINA's sponsors argued that Congress "[could] not possibly afford to wait any longer"[143] for this problem "to flourish [and] take root."[144, 145] Although not relied on by Congress,

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[139] *Compare*, *e.g.*, U.S. Office of Tech. Assessment, *The Role of Genetic Testing in the Prevention of Occupational Disease* (Apr. 1983) (describing genetic testing as "in its infancy," with screening available for only a few traits, and not reliable for use in the general population), *with*, Amanda K. Sarata, *CRS Report for Congress: Genetic Testing: Scientific Background for Policy makers* (Jan. 2007) (describing rapid growth in genetic testing, with over 1,000 tests available for clinical use).

[140] *See*, *e.g.*, Andrew E. Rice, *Eddy Curry and the Case for Genetic Privacy in Professional Sports*, 6 VA. SPORTS & ENT. L.J. 1, 5 (2006) (noting more than six-fold increase in number of testable disease-related traits since 1997).

[141] *See* S.REP. NO. 110-48 at 9; 42 U.S.C. § 300b. The sterilization laws, which persisted for longer than mandatory sickle cell screening and involved an even more egregious invasion of privacy, would also be relevant to this analysis. *See* Tennessee v. Lane, 541 U.S. 509, 534 (2004) (Souter, J., concurring) (citing these laws as supporting the ADA).

[142] *See* Norman-Bloodsaw v. Lawrence, 135 F.3d 1260 (1998).

[143] 110 Cong. Rec. H4095 (daily ed. Apr. 23, 2007) (statement of Rep. Slaughter).

[144] Roberts, *supra* note 77 at 31 (quoting Sen. Snowe).

[145] The Court's rejection of what it called "speculative harms" in *Florida Prepaid* is easily distinguished. There, the Court dismissed Congress's concern that "patent infringement by States might increase in the future," calling it merely "speculative." 527 U.S. 627, 541 (1999). This concern was based on the trend in state universities toward commercializing the results of research. H.R. REP. NO. 101-960, pt. 1, at 38. While Congress had evidence of a pattern of patent violations in the private sector, unlike with GINA there was no historical evidence to suggest that states would be likely to engage in this sort of behavior. Moreover,

the history of disability discrimination identified in *Lane* further establishes this risk, because genetic discrimination is based essentially on the perception of an individual's propensity to become disabled.[146]

States will argue, however, that such a flexible approach to GINA is inconsistent with the Court's recent precedents. While the post-*Boerne* cases have not squarely held that a showing of widespread and recent state violations is always required, their general approach, as well as some isolated language, can be interpreted as adopting that approach.[147] Accordingly, states will argue that the flexible, risk-based analysis of earlier cases like *Rome* has been abandoned, or limited to the context of race and/or statutory reauthorization. Under this view, section 5, as the Supreme Court has construed it, simply does not permit Congress to act with dispatch in the face of emerging threats to constitutional rights.[148]

In the event courts do hold that evidence of recent constitutional violations is always required for § 5 legislation, the GINA record may not pass muster even under *Hibbs*. As noted above, in *Hibbs* the key link between the substantial evidence of private-sector discrimination and the abrogation of state sovereign immunity was a 50-state survey showing that public sector policies "differ[ed] little from those [of] private sector

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the supposed changed circumstances relied upon by Congress in *Florida Prepaid* amounted to the fact that states' own choices gave them increased incentives to violate the law. By contrast, GINA responds to changes in *objective circumstances* that provide new opportunities and incentives for constitutional violations.

[146] *See*, *e.g.*, Steve Lash, *Maryland employers work to comply with Genetic Information Nondiscrimination Act*, DAILY RECORD (Balt. Mar. 2, 2009) (quoting EEOC chair Stuart Ishimaru describing GINA as extending protection to individuals with a propensity to become disabled).

[147] *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997)("RFRA's legislative record lacks examples of *modern* instances…"); Bd. of Trs. of the Univ. of Ala v. Garrett, 531 U.S. 356, 369 n.6 (2001) ("there is no indication that any State had persisted in requiring such harsh measures *as of 1990 when the ADA was adopted*"). This view is most clearly stated, however, in the *Hibbs* and *Lane* dissents, which criticize the Court's reliance on "outdated" evidence. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 744 (Kennedy, J., dissenting); Tennessee v. Lane, 541 U.S. 509, 540 (Rehnquist, C.J., dissenting).

[148] Moreover, the pending challenge to the 2006 VRA reauthorization presents an opportunity for the Supreme Court to clarify, and possibly restrict, the application of § 5 in time-sensitive contexts.

employers."[149] The GINA record contains no such evidence that current practices in private and public employment are actually comparable. Instead there is a record similar to *Kimel* and *Garrett*, with little evidence of a link between past or private actions and contemporary state actors. Even assuming those cases would have turned out differently under the *Hibbs*/*Lane* standard, GINA is weaker: the record in *Kimel* included relatively recent evidence of age discrimination in California,[150] while *Garrett* record contained substantial evidence of disability discrimination in non-employment contexts.[151] Accordingly, while strong arguments exist for upholding abrogation under GINA's privacy provisions, that outcome is by no means certain.

GINA's narrow remedies may not compensate for a weak record

It is worth reiterating that congruence and proportionality is best understood as a balancing test. GINA provides a well-tailored remedy, placing limited burdens on states that largely track constitutional principles. Its privacy provision is "narrowly targeted" [152] at the unnecessary, covert, or coercive collection of information, and contains no less than six exceptions, ensuring that states are not punished for inadvertent or innocuous collection of information.[153] It is thus considerably less burdensome than the affirmative duties upheld in *Hibbs* and *Lane*. GINA's discrimination provision is also more narrowly

[149] *See Hibbs*, 538 U.S. at 730 n. 3; *Lane*, 542 U.S. at 529 n.17 (citing this as a key piece of evidence in *Hibbs*).
[150] *Kimel*, 528 U.S. at 90.
[151] *Garrett*, 531 U.S. at 369-72. A skeptical court could also invoke the (unsubstantiated) assertion of the Congressional Budget Office, in its cost estimate for GINA, that states are unlikely to engage in prohibited conduct. CBO Statement on H.R. 493, *in* H.R. REP. NO. 110-28 Part 1, at 49.
[152] *Cf. Hibbs*, 538 U.S. at 738.
[153] Collection of genetic information is permitted if it is inadvertent; is used anonymously and with permission for purposes of a health benefit program; consists of family medical history needed to comply with the FMLA; appears in publicly or commercially available documents; is appropriately used to monitor the potential effects of toxic substances; or if the employee works in DNA testing and a sample is needed to detect contamination. 42 U.S.C.A. § 2000ff-1(b)(1)-(6). *See also* S. REP. NO. 110-48, at 29 (stressing that Congress carefully drafted exceptions in response to business input to avoid unintended burdens or conflicts with other laws).

tailored than the ADA's.[154] To the extent that they prevail under the evidentiary analysis of *Hibbs* and *Lane*, both provisions should be deemed sufficiently tailored as well. Yet just as the case law indicates that a stronger the record of discrimination will justify a more robust remedy, a weak record will not support even a modest remedy.[155] Thus, to the extent that the record supporting GINA is deemed insufficient to support § 5 legislation, GINA's modest scope may not suffice to save it.

III. What Went Wrong with GINA?

Based on the above analysis, GINA's employment provisions may be vulnerable to attack under the Supreme Court's Section 5 jurisprudence insofar as they provide remedies for state employees. First, unless courts apply heightened constitutional scrutiny to genetic discrimination, states may be successful in arguing that the scant evidence collected is insufficient to permit suits for damages against states under GINA's employment provision in most cases. Second, there is a strong case for abrogating sovereign immunity in those cases where employers rely on genetic information linked to particular racial or ethnic – but this will only be a limited slice of GINA cases. Third, the case for upholding GINA's privacy provision as § 5 legislation is also stronger and should prevail, but this outcome is far from certain. Thus, while in general GINA represents a story of bipartisan legislative success – providing a nuanced solution to a complex emerging problem – in the context of state employment it risks falling short, just as have previous civil rights laws. But it didn't have to be this way. Legislation contemporaneous with GINA demonstrates how Congress how can more effectively

[154] *Compare* 42 U.S.C.A. § 2000ff-1(a) (employers may not "discriminate…because of genetic information" or "limit, segregate or classify" on such basis); 42 U.S.C. § 2000ff-7 (no disparate-impact claims), *with* Bd. of Trs. of the Univ. of Ala v. Garrett, 531 U.S. 356, 372-73 (2001) (emphasizing reasonable-accommodation and disparate-impact provisions).
[155] *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

respond to the Court's § 5 jurisprudence through a combination of diligent fact-finding and careful drafting.

Building a Supporting Record: the Voting Rights Act Reauthorization Act

The Voting Rights Act Reauthorization Act of 2006 (VRARA) was passed 22 months before GINA, by similarly overwhelming margins.[156] The Act reauthorized for an additional 25 years several temporary provisions set to expire in 2007, most importantly the "preclearance" provisions, which require certain jurisdictions with a history of racial discrimination in voting to obtain prior approval from the Attorney General or a federal court for any changes in voting procedures.[157] The Supreme Court upheld the preclearance provisions when they were initially passed in 1966,[158] and upheld them again following the 1975 reauthorization.[159] This, of course, was prior to the Rehnquist Court's string of § 5 rulings.

Seeking to ensure that the reauthorization would survive judicial review, Congress developed one of the most extensive legislative records in its history.[160] The House and Senate Judiciary Committees held no less than 21 hearings on the VRARA, assembling over 15,000 pages of testimony and documentary evidence from nearly one hundred witnesses as well as other interested groups and government agencies. In addition, the committees reviewed over a dozen outside reports on the effectiveness of,

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[156] Pub. L. No. 109-246.

[157] 42 U.S.C. § 1973c. The Act also extends the VRA's language access provisions, which require certain jurisdictions to provide language assistance to voters with limited English proficiency. 42 U.S.C. § 1973aa-1a. Although originally enacted in 1975, the constitutionality of the language access requirements has never yet been challenged. *See* James Thomas Tucker, *The Battle Over "Bilingual Ballots" Shifts to the Courts: A Post*-Boerne *Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507 (2008) (arguing provisions are constitutional); Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349 (2006) (same). *But see* Tucker, *supra*, at 514 (quoting testimony by opponent that provisions would probably be challenged if reauthorized).

[158] South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[159] City of Rome v. United States, 446 U.S. 156 (1980).

[160] H.R. REP. NO. 109-478, at 5 (2006); S. REP. NO. 109-295, at 10 (2006).

and continuing need for the preclearance provisions in covered jurisdictions around the country. This record included statistics regarding state registration and turnout; low numbers of minority elected officials in covered jurisdictions, numbers of Attorney General objections and "more information" requests filed regarding proposed voting changes; numbers of judicial preclearance and enforcement suits brought under the Act; constitutional suits over voting discrimination; the employment of federal election observers; patterns of racially-polarized voting; and evidence that Section 5 deterred state and local officials from adopting voting changes.

From this evidence, Congress concluded that while "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters," "vestiges of discrimination in voting continue to exist."[161] Congress focused especially on the proliferation of litigation and federal government objections and oversight actions in relation to state and local voting practices, which Congress believed demonstrated that the Act continued to prevent discrimination that would otherwise have occurred.[162] Congress also pointed to continuing patterns of racially polarized voting, which provide a continuing political incentive for race-based manipulation of the polls.[163] Additionally, the House Report provided an extended discussion of Congress's powers under the Fourteenth and Fifteenth Amendments, and explained how the Act satisfied Supreme Court precedents.[164] The reauthorization of the preclearance provisions was immediately challenged, and was upheld by a three-judge panel of the D.C. federal district court,

[161] Pub. L. No. 109-246, § 2(b)(1), (2).
[162] *Id.* at § (4)-(5), (8).
[163] *Id.*
[164] H.R. REP. NO. 109-478, at 54-60 (2006). *But see* Persily, *supra* note 131, at 182-92 (describing the controversial, post-enactment Senate Report, joined only by Republicans and raising reservations about the bill).

which found that the VRARA record was "far more powerful" than those found satisfactory in *Hibbs* and *Lane*.[165]

At oral argument on April 28, 2009, however, five justices appeared skeptical of the scope and supporting record of the reauthorization.[166] In particular, they noted that while Congress compiled an extensive record, it failed to reexamine the geographic coverage of the preclearance provisions in light of the passage of time.[167] Given the tensions in the Court's § 5 precedent and the shift in its membership, it is impossible to predict how this case will be decided – or what shifts in § 5 doctrine may result.[168] Nevertheless, the VRARA represents the kind of robust effort Congress can make to justify its exercise of this remedial authority to protect civil rights according to the Court's announced criteria. Of course, Congress will likely not be able to develop such a truly massive record each time it exercises its § 5 authority, and may not always place such a high priority on doing so. Nor will such an overwhelming effort necessarily be

[165] Northwest Austin Mun. Util. Dist. No. 1 v. Mukasey, 573 F.Supp.2d 221, 271 (D.D.C. 2008). Because the suit asserted both a constitutional challenge and the plaintiff jurisdiction's claim for "bailout" from the preclearance requirements, it was subject to the VRA's provision for review by a three-judge district court panel, with direct review by the Supreme Court. 42 U.S.C. § 1973aa-2.

[166] Transcript of Oral Argument, Northwest Austin Mun. Util. Dist. No. 1 v. Mukasey (No. 08-322).

[167] *Id.* While the fact-finding behind the VRARA was massive, lawmakers declined to reexamine the structure of the preclearance provisions themselves, judging that opening this settled "can of worms" would have caused "the political coalition behind the law [to] collapse[.]" Persily, *supra* note 131, at 207-16. Some commentators cautioned that, although Congress's fact-finding process was aimed at surviving judicial review, the failure to revisit the substance of the law, including its coverage and bailout formulas, may have jeopardized it. *See* Richard H. Pildes, *Political Avoidance, Constitutional Theory and the VRA*, 117 YALE L.J. POCKET PART 148 (2007).

[168] *See*, *e.g.*, Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 130 (2007) (concluding that "the question for the future is ultimately a question of judicial attitudes and whether the Court can muster the will to strike down the most effective civil rights statute in history"). Numerous commentators have argued that the preclearance provisions should be upheld. *See, e.g.*, Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act*, 43 HARV. C.R.-C.L. L. REV. 385 (2008); Karlan, *supra* note 67; Posner, *supra* note 125; Tokaji, *supra* note 160.

required for other laws, given the unique burdens imposed on states by the VRA.[169] But the VRARA shows that Congress can, when sufficiently motivated, recognize the challenges posed by the Court's § 5 precedents and make a concerted effort to overcome them.

Findings, Rights and Remedies: the End Racial Profiling Act

Another example of building support for congressional authority into legislation is the proposed End Racial Profiling Act (ERPA), first introduced by Rep. John Conyers and Sen. Russ Feingold in 2001 in response to concerns that law enforcement agencies were unfairly targeting minorities for routine both routine and spontaneous stops and searches.[170] The Act would prohibit federal, state and local law enforcement agencies from "relying, to any degree, on race, ethnicity national origin, or religion" in investigation or enforcement decisions, except when using a description of a specific criminal suspect.[171] ERPA contains numerous findings that support its constitutionality under § 5, including: a finding that "[s]tatistical evidence from across the country demonstrates that racial profiling is a real and measurable phenomenon"; specific findings to that effect from national surveys; that racial profiling increased in the wake of September 11, 2001; and that such profiling violates the Equal Protection Clause.[172] Particularly notable in light of *Lane*, the legislation invokes not only equal protection but also the rights to travel and to be free from unreasonable searches and seizures as bases for the legislation, along with the Commerce Clause (on the basis that racial profiling

[169] *See*, *e.g.*, Berry v. Doles, 438 U.S. 190, 200 (1978) (Powell, J., concurring in judgment) ("It must be remembered that the Voting Rights Act imposes restrictions unique in the history of our country on a limited number of selected States").
[170] End Racial Profiling Act of 2008, S. 110-2481/H.R. 110-4611 (most recent version); End Racial Profiling Act of 2001, S. 107-989/H.R. 107-2074 (original version).
[171] End Racial Profiling Act of 2008, §§ 3(6), 101.
[172] *Id.* at § 2(a).

discourages interstate travel).[173] While ERPA has never been reported out of committee, these statutory findings and purposes would likely be sufficient to support the Act's limited ban on consideration of race, and its provision for citizen suits for injunctive relief and attorneys' fees.[174]

The Waiver Approach: the Employment Non-Discrimination Act

As previously discussed, it might have been impossible, even with the best efforts, for Congress to document a widespread pattern of present genetic discrimination. Fortunately, this is not the only way Congress can effectively respond to the Court's § 5 precedents. Indeed, Congress likely could have ensured GINA's full application to state employers by requiring that states waive their immunity in exchange for maintaining federal grants. The Supreme Court made clear two decades ago, in Chief Justice Rehnquist's opinion in *South Dakota v. Dole*, that imposing conditions on federal funding for the states is generally permissible.[175] Responding to a Supreme Court decision that limited remedies under the Rehabilitation Act,[176] Congress passed a law in 1986 that explicitly required, as a condition of receipt of *any* federal funds, a waiver of states' sovereign immunity for suits under that Act as well as under Title VI of the Civil Rights Act, and Title IX of the Education Amendments of 1972.[177] Every court of appeals has accepted the validity of such waivers.[178] While some commentators warned during the

[173] *Id.* at § 2(b).
[174] *Id.* at § 102. In addition to the mandatory prohibition on racial profiling, ERPA would make the implementation of certain policies to prevent such profiling a condition for receipt of certain federal grants. These conditions are not subject to private judicial enforcement, but instead to an administrative complaint process. *Id.* at §§ 301-303.
[175] 483 U.S. 203 (1987) (upholding condition on federal highway funds that states enact minimum). drinking age of 21).
[176] Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).
[177] 42 U.S.C. § 2000d-7 (Civil Rights Remedies Equalization Act).
[178] *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 127–29 (1st Cir. 2003); *Koslow v. Pennsylvania*, 302 F.3d at 167–76 (3d Cir. 2003); *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474,

Rehnquist years that aggressive use of the spending power might be seen by the Court as impermissible "circumvention" of its federalism rulings,[179] the Roberts Court has given no indication that it will invalidate such legislation wholesale .[180]

The current Court has, however, said that it will interpret all such legislation narrowly. In *Arlington Central School District v. Murphy*, Justice Alito wrote for the Court that any law based on Congress's spending power will be valid only to the extent that it provides "clear notice" to state officials of the full extent of every duty and potential liability it creates.[181] *Arlington* could result in a contraction of individual rights and remedies under a variety of federal laws.[182] For example, following *Boerne*, Congress expressly required that states waive their immunity in religious-expression cases a condition of federal funding.[183] While courts have upheld this waiver, several

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491–96 (4th Cir. 2005); *Miller v. Texas Tech Univ. Health Sciences Ctr.*, 421 F.3d 342, 349 (5th Cir. 2005) (en banc); *Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626 (6th Cir. 2001); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C. v. United States*, 235 F.3d 1079, 1081–82 (8th Cir. 2000) (en banc); *Lovell v. Chandler*, 303 F.3d 1039, 1050–52 (9th Cir. 2002); *Brockman v. Wyo. Dept. of Fam. Servs.*, 342 F.3d 1159, 1167–68 (10th Cir. 2003); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1293 (11th Cir. 2003) (per curiam); *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161 (D.C. Cir. 2004). *But see Garcia v. SUNY Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 113–15 (2d Cir. 2001) (holding waiver does not extend to disputes arising prior to time when abrogation of immunity under ADA was in question). *See also* Rochelle Bobroff & Harper Jean Tobin, *Strings Attached: The Power of the Federal Purse Waives State Sovereign Immunity for the Rehabilitation Act*, 24 CLEARINGHOUSE REV. 1-2, 16 (2008) (summarizing these cases).

[179] *See e.g.*, Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003).

[180] See Neil S. Siegel, Dole*'s Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. 165, 201 (2008); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 Duke L. J. 345, 355-84 (2008).

[181] 548 U.S. 291 (2006). Prior to *Arlington*, a clear-notice standard had applied only to a limited set of questions about "unforeseeable" forms of liability, rather than to every question of remedies or interpretation. *See*, *e.g.*, *id.* at 304-05 (Ginsburg, J., concurring in part and in judgment); *id.* at 316-86 (Breyer, J., dissenting); Barnes v. Gorman, 536 U.S. 181, 188 n. 2 (2002); *id.* at 191 (Souter, joined by O'Connor, J., concurring); Bennett v. Kentucky Dep't of Educ., 470 U.S. 656, 665-66 (1985).

[182] *See Arlington*, 548 U.S. at 318 (Breyer, J., dissenting) ("to view each statutory detail of a highly complex federal/state program …simply through the lens of linguistic clarity, rather than to assess its meanings in terms of basic legislative purpose, is to risk a set of judicial interpretations that can prevent the program, overall, from achieving its basic objectives or that might well reduce a program in its details to incoherence"). *See also* Bagenstos, *supra* note 184, at 350 (arguing that the Roberts Court is likely to apply *Arlington* to "skew the interpretation and limit the enforceability of conditional spending statutes").

[183] 42 U.S.C. § 2000cc-2(a).

have ruled that it does not extend to damages – even though this was clearly Congress's intention.[184]

While reliance on the spending power may present something of a trade-off because of *Arlington*, satisfying the Court's standards for textual clarity with confidence will generally be easier than satisfying its standards of evidence. A bill contemporaneous with GINA illustrates how Congress can use the spending power to effectively respond to *Kimel* and *Garrett*, while also avoiding the potential pitfalls of *Arlington*. The Employment Non-Discrimination Act (ENDA), which passed the House in the 110th Congress but stalled in the Senate, included explicit spending-based waiver language.[185] The bill, which would prohibit discrimination on the basis of sexual orientation, has been introduced in Congress beginning in 1994.[186] Waiver language was first inserted into the bill in 2002, shortly after the *Garrett* decision.[187] The 2002 Senate and 2007 House reports on ENDA provide a stark contrast to the reports on GINA. These reports specifically invoke both the Fourteenth Amendment and the Spending Clause; discuss in detail the Supreme Court's decisions on both abrogation and waiver of state sovereign immunity; and outline in detail why the bill complies with both lines of decisions.[188] The

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[184] *Compare, e.g.*, Smith v. Allen, 502 F.3d 1255 (11th Cir. 2007), *with* Madison v. Virginia, 474 F.3d 118 (4th Cir. 2006); Sossamon v. Texas, --- F.3d ----, 2009 WL 382260 (5th Cir. 2009); Williams v. Beltran, 569 F.Supp.2d 1057, 1059 (C.D.Cal. 2008); El Badrawi v. Dept. of Homeland Sec., 579 F.Supp.2d 249, 259 (D.Conn. 2008); Pugh v. Goord, 571 F.Supp.2d 477, 507 (S.D.N.Y. 2008). This distinction is especially dubious because under the doctrine of *Ex Parte Young*, Congress could have allowed for injunctive relief against states even without a waiver. By far the most likely explanation for the provision's inclusion, and one states could easily comprehend, is that Congress intended to expand the relief that would otherwise be available. *Compare* Webman v. Fed. Bureau of Prisons, 441 F.3d 1022 (D.C. Cir. 2006) (applying suit/liability distinction to federal immunity, where *Young* does not apply).

[185] H.R. 110-3685, § 11(b).

[186] The version of the bill introduced in the 111th Congress will likely also prohibit discrimination on the basis of gender identity, which civil rights groups insist must be included. *See* Lou Chibbaro, Jr., *Hate crimes, ENDA seen as top legislative priorities*, WASH. BLADE (Dec. 5, 2008).

[187] *Compare* H.R. 106-2355 § 13 *with* H.R. 107-3685 § 13.

[188] S. REP. NO. 107-1284, at 19-25 (2002); H.R. REP. NO. 110–406, at 27-30 (2007). As support for abrogation, the reports pointed to "half a century's worth of severe anti-gay bias in both the state and

bill also avoids *Arlington* problems by linking its remedies provisions to Title VII of the Civil Rights Act, and by expressly providing for attorney and expert fees.[189]

Explanations for GINA's Shortcomings

As enacted, GINA provides less than robust support for abrogation of state sovereign immunity based on the § 5 power, and no alternative provision for waiver of that immunity. GINA's to address the standards set by the Supreme Court is particularly striking given that GINA is the first new employment discrimination law passed since *Kimel* was decided in 2000. Why did Congress fail to clearly invoke its Fourteenth Amendment power, produce a more extensive record and a more compelling explanation of the need to apply GINA to the states, or include a provision requiring waiver of state immunity? Moreover, why did Congress fail to take these steps with GINA when it did take them with other, contemporaneous legislation? Although it may have been difficult – perhaps even impossible – to develop a much stronger record in light of the emergent nature of the problem of genetic discrimination, Congress could still have relied on a funding-based waiver of immunity, as it did in ENDA.[190]

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private employment contexts." They noted that such discrimination was in the past "a matter of policy…in many police forces, fire departments, schools, and public agencies of our country." And they cited numerous legal and historical sources detailing the history of anti-gay discrimination, including the history of constitutional litigation. H.R. REP. NO. 110–406, at 11-15 (2007). The 2007 report cited numerous studies and reports on the continued prevalence of sexual orientation discrimination. *Id.* at 15-16. It also described numerous individual cases, including ten litigated cases of discrimination by state and local agencies. *Id.* at 13-17.

[189] H.R. 110-3685, §§ 10, 12. Ironically, the Eleventh Amendment was cited as one reason President Bush might veto ENDA – despite the inclusion of a spending-based waiver clause of the type courts have upheld. Office of Management and Budget, *Statement of Administration Policy – H.R. 3685 – The Employment Non-Discrimination Act* (Oct. 23, 2007). By contrast, the Eleventh Amendment was never raised in objection to GINA. *See*, *e.g.*, OMB, *Statement of Administration Policy – H.R. 1424 – Paul Wellstone Mental Health and Equity Act of 2007* (Mar. 5, 2008).

[190] Other potential explanations are also unsatisfactory. If Congress had been simply lulled into complacency by the decisions in *Hibbs*, *Lane* and *Georgia*, it likely would not have gone to the trouble it did with the VRA. And if Congress had willfully rejected the Court's rulings, it would presumably have said so, as it did when it passed the Partial-Birth Abortion Ban Act of 2003. *See* Pub. L. 108-105 § 2 (2003).

The most likely explanation is that, amidst the many considerations that went into crafting this complex bill and building bipartisan support for it, justifying GINA's application to the states was simply neglected. The contrast with the VRARA and ENDA is likely explained by the higher profile and more controversial nature of those bills, and by the fact that Congress is not a unitary actor. Unlike GINA, ENDA and the VRA preclearance provisions faced longstanding ideological opposition, and a judicial challenge was nearly a foregone conclusion.[191] Additionally, some members of Congress (along with, of course, their staff and the advocacy groups that help draft legislation) are presumably more sensitive than others to the possibility of federalism-based constitutional challenges. For these reasons, lawmakers and advocates crafting the VRARA, ERPA and ENDA responded to *Kimel* and *Garrett* with new language and findings, while those working on GINA did not.

IV. The Solution: Renewed Congressional Engagement with the Court

The explanation for GINA's vulnerabilities may well be some combination of insufficient attention by lawmakers and real hurdles presented by the Court's jurisprudence. This suggests a twofold problem for Congress in passing effective legislation that protects individual rights and applies to public and private entities alike. On the one hand, lawmakers should give greater and more consistent attention to the Court's federalism jurisprudence in the development of legislative language and history. The foregoing analysis suggests some guidelines Congress should follow:

[191] *See, e.g.*, James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007); Sharon M. McGowan, *The Fate of ENDA in the Wake of Maine: A Wake-Up Call to Moderate Republicans*, 35 HARV. J. ON LEGIS. 623 (1998) . Indeed, the challenge to the preclearance provisions was filed just weeks after the VRARA was enacted. *Northwest Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F.Supp.2d 221, 223 (D.D.C. 2008).

Congressional intent. Lawmakers should state explicitly, preferably in the statutory text itself, the legislation's basis in Congress's commerce, spending, and/or Fourteenth Amendment powers. They should also indicate, through a statutory statement of purpose, the range of constitutional rights Congress is seeking to protect when invoking the § 5 power. Because some laws, such as the ADA, potentially protect a wide range of constitutional rights, this statement should use language that is exemplary rather than exhaustive. Finally, Congress should state explicitly that it intends to abrogate sovereign immunity pursuant to the § 5 power.

Careful fact-finding. Congress should make a concerted attempt to develop a factual record that will satisfy the Court's precedents. This means not only establishing the general need for legislation, but also amassing substantial evidence that speaks to the standards of relevance the Court has articulated with regard to state action and constitutional violations. This record – developed through hearings, solicitation of reports from relevant organizations, and reports of congressionally delegated agencies – should be discussed in detail in committee reports, and reflect in specific statutory findings.

Analysis of precedent. Although the Court has never specifically faulted lawmakers for failing to discuss its prior decisions, Congress can likely strengthen its case by explaining how the record it has developed, and the remedies it has provided, comport with the case law. When applying damages remedies to the states, this means explaining in detail why Congress found a serious threat of constitutional infringements by states. It also means justifying the precise scope of statutory remedies in terms of that threat. In contrast to the scant discussion in the reports on GINA, the discussions of

congressional authority in the VRARA and ENDA reports read like an opening brief, setting out a roadmap for courts to uphold the legislation.

Express waiver of immunity. A provision requiring waiver of immunity in exchange for federal funding can provide a "belt-and-suspenders" approach, avoiding uncertainties concerning the sufficiency of the legislative record. While reliance on the spending power can raise "clear notice" problems under *Arlington*, the risk of relying on § 5 alone may be greater, for example, where legislation addresses a relatively new problem, where much of the evidence identified by Congress may not meet the Court's standards of relevance, or where the strength of the supporting record is otherwise in doubt. Waiver provisions should refer specifically to waiver of immunity and/or to liability based on receipt of federal financial assistance.

Enumeration of remedies. Because of the Court's parsimonious approach to spending-based statutes in *Arlington*, reliance on this power makes it especially important to spell out statutory remedies with particularity, including not only a right to sue but a specific enumeration of remedies. One approach, used in both GINA and ENDA, is to link the new statute to the remedies provisions of an existing law such as Title VII of the Civil Rights Act.[192] Alternatively, Congress may simply enumerate the range of available remedies, *e.g.*, *equitable and legal relief, including back pay, damages, and reasonable attorneys' fees (including expert fees).*

[192] 42 U.S.C.A. § 2000ff-6; H.R. 110-3685, § 10(b).

These guidelines should form a "federalism checklist" for all legislation (such as civil rights laws and other measures protecting individual rights) that could be subject to federalism-based challenges.[193]

At the same time, even Congress consistently "doing its homework" cannot completely guarantee that remedial legislation will not be invalidated or eroded. The shifting, fact-bound, and splintered nature of the Court's decisions in this area means that § 5 legislation will always face some risk of invalidation. And while funding-based waivers provide an alternative to this risk in the state immunity context, after *Arlington* they may also present some (though probably less) risk of restrictive interpretation of rights and remedies. Therefore, lawmakers should strive to defend Congressional authority against further abridgment by the courts.[194]

To this end, Congress should consider nominees' views of congressional power in confirmation votes for all federal judges, as well as relevant executive officials.[195] Members of the Senate Judiciary Committee took steps in this direction by raising the Court's Commerce Clause and § 5 decisions during the confirmations of Chief Justice Roberts and, to a lesser extent, Justice Alito.[196] Lawmakers should also be more active in speaking directly to the Supreme Court through *amicus* briefs when congressional authority is at issue, providing a potentially powerful supplement to the voice of the

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[193] *Cf.* Deborah Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 62-63 (2009) (suggesting steps Congress should take to ensure the full effectiveness of overrides of the Court's statutory decisions).

[194] Some have called for stronger responses to constitutional decisions of which lawmakers disapprove, including limiting courts' jurisdiction or appropriations, or impeaching judges based on their decisions. *See, e.g.*, Mark C. Miller, *When Congress Attacks the Federal Courts*, 56 CASE W. RES. L. REV. 1015 (2003). In addition to the obvious fact that jurisdiction-stripping would be self-defeating in the context of preserving federal remedies, these responses are objectionable because they would directly interfere with the work of the federal courts and threaten judicial independence.

[195] *See* Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-First Century*, 1 HARV. L. & POL'Y REV. 3 (2007); Hillary Rodham Clinton & Goodwin Liu, *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 GEO. L.J. 439 (2003).

[196] *See* Lazarus, *supra* note 9, at 9-14, 28-29.

Solicitor General – as did fifty-one current and former members of Congress in *Hibbs*.[197] Finally, Congress can appeal to the Court's dependence on its perceived legitimacy through the use of oversight hearings, resolutions, and other public statements to spotlight disfavored decisions. The Senate Judiciary Committee held such a hearing in 2002 in response to the initial run of § 5 cases.[198] These congressional efforts to date have been laudable but sporadic, and should be strengthened.

V. Conclusion

In crafting new legislation, considerations of individual remedies, judicial enforcement, and possible legal challenges almost inevitably take a back seat to matters of substance and politics. But following the Rehnquist Court's "federalism" decisions, inattention to these matters can have a significant and detrimental effect on the ultimate effectiveness of legislation. Analysis of GINA, and comparison to the VRARA, ERPA, and ENDA, suggest that Congress has been inconsistent in its responses to this challenge. Congress has given the Court's federalist jurisprudence careful attention when developing high-profile and controversial bills, but not for lower-profile bills.

If Congress is to uphold its prerogatives and ensure the full effectiveness of federal laws, its response must be more than sporadic. Due consideration must be given to the federalism hurdles imposed by the Court in developing *any* legislation that protects

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[197] Brief of *Amici Curiae* Sens. Dodd & Kennedy, and Reps. Schroeder, Roukema & Miller, Nevada v. Hibbs, 2002 WL 31477652 (2002). *See also*

[198] See *Narrowing the Nation's Power: The Supreme Court Sides with the States*, 107th Cong. (Oct. 1, 2008) (Statement of Sen. Patrick Leahy). In 2008, the committee held three hearings focused on statutory and preemption decisions that, in the committee leaders' view, undermined the rights of workers and consumers by limiting remedies and private rights of actions for a wide range of bad acts by businesses. See *Protecting Consumers by Protecting Intellectual Property: Hearing Before the S. Judiciary Comm.*, 110th Cong. (2008); *Short-change for Consumers and Short-shrift for Congress? The Supreme Court's Treatment of Laws that Protect Americans' Health, Safety, Jobs and Retirement: Hearing Before the S. Judiciary Comm.*, 110th Cong. (2008); *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporation: Hearing Before the S. Judiciary Comm.*, 110th Cong. (2008).

individual rights against state actors; this includes building a strong evidentiary record, drafting committee reports that address the Court's precedents, and including specific statutory findings, statements of purpose, and private remedies. It will also include using Congress's oversight and nominations powers, as well as participation before the Court itself.

The steps I have suggested may or may not require significant expenditures of legislative resources or political capital; they will certainly require consistent attention. Ensuring that widely-accepted laws do not become judicial casualties must become a routine part of the work of Congress. Otherwise, Congress will continue to pass important laws like the ADA and GINA – often after years of work to develop nuanced solutions and build bipartisan support – only to see their impact blunted by the courts on "federalism" grounds.