Federalism & Separation of Powers

Comment: *Nevada Department of Human Resources v. Hibbs*

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Editor's Note: Another perspective on the Hibbs case is offered by Amelia W. Koch and Steven F. Griffith, Jr. at page 104 of this issue.

Introduction

In a Term that has laid to rest the exaggerated claim that the Rehnquist Court is "conservative," perhaps the most surprising decision was in the arena of federalism, one area in which this Court has genuinely made some strides toward restoring the balance between federal and state power contemplated by the Constitution. *Nevada Department of Human Resources v. Hibbs*[1] did not merely refuse to extend the Court's recent Enforcement Clause case law in areas involving heightened constitutional scrutiny. Instead, it marked a significant expansion of congressional power even over the outer bounds recognized in the Voting Rights Act cases (which involved racial discrimination, subject to the highest level of scrutiny) and introduced several innovations in the Section 5 analysis that could allow for a far greater latitude for congressional Enforcement Clause power in a wide variety of areas.

I. The *Hibbs* Decision

The events giving rise to the *Hibbs* litigation began in 1997 when William Hibbs, an employee of the Nevada Department of Human Resources Welfare Division (the "Department"), requested leave to care for his wife. The federal Family and Medical Leave Act of 1993 (the "FMLA") requires that employers, expressly including state agencies,[2] offer eligible employees at least twelve weeks of unpaid leave each year for any of several reasons, including a spouse's "serious health condition."[3] While the Department granted Hibbs twelve weeks of leave, it ultimately terminated Hibbs when he failed to return to work after being informed that the leave had expired.

Hibbs brought suit against the Department in the District of Nevada, alleging that the Department had violated the leave provision of the FMLA. The district court granted summary judgment to the Department on the FMLA claim on sovereign immunity grounds. The Ninth Circuit reversed, holding that the leave provisions of the FMLA were validly enacted under Section 5 of the Fourteenth Amendment and, therefore, permissibly abrogated the states' sovereign immunity.

The Supreme Court affirmed the Ninth Circuit. Chief Justice Rehnquist, writing for the Court, observed that the Congress had clearly expressed its intent to abrogate the states' sovereign immunity in the FMLA.[4] Emphasizing that sex-based classifications are subject to heightened constitutional scrutiny,[5] the Court held that, in enacting the FMLA, the Congress had evidence of states' longstanding employment discrimination on the basis of sex, including ongoing discriminatory application of leave policies.[6] The FMLA leave provision extended beyond prohibiting unconstitutional conduct to affirmatively requiring leave minimums to all eligible employees without regard to discrimination, but the Court held, pursuant to *City of Boerne v. Flores*,[7] that the leave provisions of the FMLA were "'congruent and proportional'" responses to the infirmities identified by the Congress and, hence, proper prophylactic legislation under Section 5.[8] The Court found that the leave requirement was designed to "ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees"[9] and that the measure was "narrowly targeted at the fault line between work and family."[10] Finally, the Court concluded that the propriety of the measure was supported by the fact that it was limited in various ways and was not unduly expansive.[11] Thus, the Court held that it was valid Section 5 legislation and validly abrogated the sovereign immunity of the states.

Justice Stevens, the sixth vote in favor of the outcome in *Hibbs*, rejected the Court's Enforcement Clause rationale, but he concurred in the judgment on the view that the Congress can validly abrogate the States' sovereign immunity through Commerce Clause legislation.[12] Justice Souter, joined by Justices Ginsburg and Breyer, joined the opinion of the Court but wrote separately to reaffirm his broader view of the Enforcement Clause power.[13] Justice Kennedy wrote the principal dissent, which Justices Scalia and Thomas joined,[14] and Justice Scalia wrote a separate dissenting opinion.[15]

The significance of *Hibbs* must be evaluated in light of its place in the Court's Section 5 jurisprudence. A brief survey of the most significant cases in this area is therefore required at the outset.

II. The Enforcement Clause Case Law Before *Hibbs*

*A. The Pre-*Boerne *Case Law*

The ratification of the Reconstruction amendments unquestionably created a significant new federal role in the area of civil rights. The Court has long held that the congressional enforcement powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment are broad and important components of the new constitutional order.[16] Nonetheless, despite the substantial deference that has sometimes been afforded to congressional determinations in this area,[17] the Court has never authorized Enforce-

ment Clause legislation that is unrelated to redressing the substantive provisions of the respective amendments. *City of Boerne*, discussed in the next section, is the leading case of the Rehnquist Court on the scope of the Congress's Enforcement Clause powers, but the analysis must begin with the cases preceding that landmark decision.

The primary pre-*Boerne* authorities on the scope of the Enforcement Clause powers are a series of cases under the Voting Rights Act, beginning with *South Carolina v. Katzenbach*.[18] That case involved constitutional challenges to several Voting Rights Act remedies imposed upon "covered" jurisdictions, geographical areas determined according to a statutory formula to capture the places where "various tests and devices ha[d] been instituted with the purpose of disenfranchising Negroes . . . for many years."[19] The Court upheld the geographically tailored imposition of a suspension of voting tests (such as literacy examinations) that had been found to be applied in these areas as a pretext for unconstitutional racial discrimination in voting,[20] as well as a federal pre-clearance requirement for new voting qualifications in covered jurisdictions "to determine whether their use would perpetuate voting discrimination."[21] The Court also upheld the use of federal examiners to police compliance with constitutional requirements under certain circumstances.[22] All the challenged provisions in *South Carolina* were both geographically tailored to areas with demonstrated histories of unconstitutional discrimination and responsive to conduct that was determined to be a pretext for constitutional violations (or else provided machinery for enforcing the prohibitions against unconstitutional discrimination).

The Court returned to the enforcement power later the same Term in *Katzenbach v. Morgan*,[23] which upheld a nationwide prohibition against denying voting rights on grounds of illiteracy to any person who had completed the sixth grade in any state or Puerto Rico. The provision was directed toward addressing "the disenfranchisement of large segments of the Puerto Rican population in New York,"[24] which the Congress permissibly found to be caused by intentionally discriminatory application of literacy requirements.[25]

Oregon v. Mitchell[26] involved (1) a temporary nationwide prohibition against the imposition of literacy tests and other statutorily defined voting "tests or devices"; (2) a ban on state durational residency requirements in presidential elections; (3) an imposition of rules regarding absentee voting in such elections; and (4) a requirement that states extend the franchise to those eighteen or older.[27] A fractured Court upheld the nationwide ban on disfavored tests and devices, as well as the two presidential-election requirements. The primary opinion emphasized the "long history of the discriminatory use of literacy tests to disfranchise voters on account of their race" in allowing the prohibition against the tests and devices[28] and the special federal role in "creat[ing] and maintain[ing] a national government"—independent of any power under the Reconstruction amendments—in upholding the presidential election requirements.[29] Nonetheless, the Court struck the voting-age requirement, where "Congress [had] made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race."[30]

Finally, *City of Rome v. United States*[31] upheld application to the statutorily covered jurisdictions of an "effects" test that banned conduct with a racially disparate impact, despite the fact that the Constitution prohibits only intentional discrimination. The Court allowed this application as a prophylactic measure because "'Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.'"[32]

The foregoing line of Voting Rights Act cases thus upheld the power of the Congress under its Reconstruction amendment enforcement powers to prohibit conduct not violative of the substantive provisions of the amendments only under one of two circumstances: (1) where the Congress had permissibly found that the banned conduct was traditionally used as a pretextual means of intentionally discriminating in violation of the amendments (as in *Morgan* and *Oregon*); or (2) where the prophylactic measure was geographically tailored to the "areas where voting discrimination ha[d] been most flagrant"[33] (as in *South Carolina* and *City of Rome*). Where neither of these conditions were present, the Court has struck legislation as exceeding the enforcement power.[34]

The Court had thus never authorized any nationwide general prophylactic measure not involving specific conduct found to be a pretext for unconstitutional discrimination—even in the context of racial discrimination, which is subject to the highest level of constitutional scrutiny.[35] Indeed, five judges of the Second Circuit joined a pre-*Boerne* opinion concluding that, under the Supreme Court's precedents, "it is unclear whether . . . the 'results' methodology of [amended Section 2 of the Voting Rights Act, which imposes a nationwide effects test] is constitutionally valid."[36]

B. City of Boerne *and its Progeny*

Seminole Tribe v. Florida,[37] which held that the Congress cannot abrogate the states' sovereign immunity when legislating pursuant to its Article I powers, ushered in a new wave of Enforcement Clause cases, because the validity of legislation under the commerce power could not justify its application to creating private damages actions against non-consenting states. As it happens, *City of Boerne*, which struck down the Religious Freedom Restoration Act (the "RFRA") as exceeding the Section 5 power, was not such a sovereign immunity case, but it nonetheless was the first Supreme Court opinion to address the scope of the Section 5 power in the wake of *Seminole Tribe* and the first to return to the issue since 1980.

City of Boerne articulated much more expressly than the earlier precedents the limitations upon the Congress's power to enforce the Reconstruction amendments. It reemphasized that the scope of the power is ultimately a question for the judiciary[38] and that "Congress' power under § 5 . . . extends only to 'enforcing' the provisions of the Fourteenth Amendment."[39] While *City of Boerne* reaffirmed that the Congress could, where appropriate, prohibit conduct that was not itself unconstitutional, the Court held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[40] The Court held that the RFRA failed this test because it went beyond constitutional requirements in prohibiting government conduct adversely affecting religious practices.[41]

The Court applied and refined the *City of Boerne* test for Enforcement Clause legislation in several subsequent cases involving the propriety of congressional attempts to abrogate the states' sovereign immunity, including *Florida Prepaid Postsecondary Educational Expense Board v. College Savings Bank*,[42] *College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board*,[43] *Kimel v. Florida Board of Regents*,[44] and *Board of Trustees of University of Alabama v. Garrett*,[45] as well as one case outside the sovereign immunity context, *United States v. Morrison*.[46] In each of these cases (none of which involved legislative classifications subject to heightened scrutiny), the Court held that the challenged legislation had not been validly enacted under the Enforcement Clause, and thus could not abrogate sovereign immunity under *City of Boerne*.

City of Boerne and its progeny confirmed the limitations already implicit in the earlier Enforcement Clause precedents. Moreover, it confirmed that some expansive dictum in a few of the earlier cases[47] could not be read to vest the Congress with unreviewable power in this area, or the power to modify the substantive scope of the amendments themselves.

III. *Hibbs* and the Court's Enforcement Clause Jurisprudence

The *Hibbs* decision signals a substantial enlargement of the congressional enforcement power under the Reconstruction amendments beyond the outer bounds recognized in the Voting Rights Act cases decided by the Warren and Burger Courts. As shown above, the Court had never before sanctioned a nationwide ban on conduct that did not violate the Constitution, except where the conduct was validly found by the Congress to have been used as a pretext for unconstitutional discrimination. *Hibbs* broke this mold by allowing a nationwide prophylactic measure designed vaguely to effectuate the general policy of alleviating sex stereotypes in the employment leave context. In reaching this unprecedented holding, the Court liberalized the Section 5 analysis in two important respects.

First, the Court introduced a significant change in the role of past unconstitutional conduct by the states in the Section 5 analysis. As shown above, the pre-*Hibbs* cases authorized the use of historical patterns of state discrimination to justify geographically tailored responses to unconstitutional discrimination of specific jurisdictions. The dissenting opinion of Justice Kennedy demonstrates the weakened evidentiary methodology used by the *Hibbs* majority to establish such a historical pattern.[48] But apart from this alteration, the *Hibbs* Court uses the pattern for a different purpose—to allow prophylaxis as a general matter on an undifferentiated, nationwide basis, rather than to do so "confined to those regions of the country where [unconstitutional conduct] had been most flagrant."[49] As Justice Scalia summed up the innovation: "Prophylaxis in the sense of extending the remedy beyond the violation is one thing; prophylaxis in the sense of extending the remedy beyond the violator is something else."[50] This is not to say that the pre-*Hibbs* approach could never, in principle, have led to validation of a broader nationwide prophylactic rule, but such a rule would have been validated only by geographically local analyses of historical state discrimination across the entire nation, and would certainly have been a rare exception. The Court's alteration of the use of past discrimination in *Hibbs* would appear to ease enormously the imposition of nationwide prophylactic measures under the Enforcement Clause.

Second, the *Hibbs* Court's purported application of the *City of Boerne* congruence and proportionality standard dramatically expands the permissible scope of prophylactic legislation. While the pre-*Hibbs* cases allowed prophylactic remedies such as results tests where necessary to combat unconstitutional intentional discrimination, *Hibbs* appears to turn this approach on its head by authorizing the imposition of a remedy (a blanket leave minimum) that does not even have any disparate impact requirement on the ground that it could be necessary to prevent a disparate impact. The Court held that the Congress had a legitimate "remedial object" in preventing states from "provid[ing] for no family leave at all" because "such a policy would exclude far more women than men from the workplace."[51] In reaching this surprising holding, *Hibbs* notably shifted the focus of the congruence and proportionality inquiry from specific unconstitutional state conduct to a far more general policy of reducing the stigma of sex stereotypes.[52] Notably, the word "stereotype" or "stereotypical" does not occur at all in the opinions of the Court in *City of Boerne*, *Florida Prepaid*, *Kimel*, or *Garrett* (although it does appear several times in the *Garrett* dissent), but it occurs no less than fifteen times in the relatively short opinion of the Court in *Hibbs*. This important modification of the congruence and proportionality standard could have an enormous effect in future cases.

Significantly, this second aspect of the *Hibbs* analysis would appear not to be limited to contexts involving heightened scrutiny. The suspect character of a legislative classification is relevant to the ease or difficulty of demon-

strating a pattern of constitutional violations by states,[53] but there would appear to be no sound doctrinal justification for allowing broader or narrower prophylaxis depending on the level of scrutiny once a pattern of unconstitutional conduct has, in fact, been established.

Conclusion

Hibbs does not merely mark the end of the recent line of cases applying limits on the Congress's Enforcement Clause powers. Instead, it represents a significant innovation of doctrine over even the broadest precedents of the Warren and Burger Courts, which will likely result in a significant expansion of congressional enforcement powers in a variety of areas. The decision could undermine developments in the area of federalism that have formerly been considered signature doctrines of the Rehnquist Court.

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Footnotes

1 123 S. Ct. 1972 (2003).
2 *See* 29 U.S.C. §§ 203(x), 2611(4)(A)(iii), 2617(a).
3 *Id.* § 2612(a)(1)(C).
4 *See Hibbs*, 123 S. Ct. at 1977.
5 *See id.* at 1978.
6 *See id.* at 1980.
7 521 U.S. 507, 520 (1997).
8 *Hibbs*, 123 S. Ct. at 1982 (quoting *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (citing *City of Boerne*, 521 U.S. at 520)).
9 *Id.*
10 *Id.* at 1983.
11 *Id.* at 1983-84.
12 *See id.* at 1984-85 (Stevens, J., concurring in the judgment).
13 *See id.* at 1984 (Souter, J., concurring).
14 *See id.* at 1986-94 (Kennedy, J., dissenting).
15 *See id.* at 1985-86 (Scalia, J., dissenting).
16 *See, e.g.*, *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879).
17 *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966).
18 383 U.S. 301 (1966).
19 *Id.* at 333-34.
20 *Id.*
21 *Id.* at 316.
22 *See id.* at 320-21, 327-33.
23 384 U.S. 641 (1966).
24 *Id.* at 645 n.3.
25 *See id.* at 654 (noting "evidence suggesting that prejudice played a prominent role in the enactment of the requirement").
26 400 U.S. 112 (1970).
27 *Id.* at 117-119 (opinion of Black, J.).
28 *Id.* at 132.
29 *Id.* at 134.
30 *Id.* at 130.
31 446 U.S. 156 (1980).
32 *Id.* at 214 (citation omitted).
33 *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).
34 *See, e.g.*, *Oregon*, 400 U.S. at 130 (opinion of Black, J.) (voting-age requirement); *see also James v. Bowman*, 190 U.S. 127, 139 (1903) (private interference with voting rights); Civil Rights Cases, 109 U.S. 3, 13-14 (1883) (private conduct); *United States v. Reese*, 92 U.S. 214, 221 (1875) (nationwide ban on interference with voting rights without race nexus).
35 While *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), held that Section 5 legislation could, in the context of a Title VII claim, abrogate state sovereign immunity, it expressly noted that it was not addressing whether Title VII was valid Section 5 legislation. *See id.* at 456 n.11.
36 *Baker v. Pataki*, 85 F.3d 919, 928 n.12 (2d Cir. 1996) (en banc) (opinion of Mahoney, J., concurring in the judgment); *see also* Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (noting that "[n]othing in [*Chisom*] addresse[d] the question whether § 2 . . . is consistent with the requirements of the United States Constitution").
37 517 U.S. 44 (1996).
38 *See City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).
39 *Id.* at 519.
40 *Id.* at 520.
41 *See id.* at 529-36.
42 527 U.S. 627 (1999) (involving the Patent and Plant Variety Protection Remedy Clarification Act).
43 527 U.S. 666 (1999) (involving the Trademark Remedy Clarification Act).
44 528 U.S. 62 (2000) (involving the Age Discrimination in Employment Act).
45 531 U.S. 356 (2001) (involving Title I of the Americans with Disabilities Act).
46 529 U.S. 658 (2000) (involving the civil remedy provisions of the Violence Against Women Act).
47 *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966).
48 *See* 123 S. Ct. at 1987-92 (Kennedy, J., dissenting).
49 *City of Boerne v. Flores*, 521 U.S. 507, 532-33 (1997).
50 *Hibbs*, 123 S. Ct. at 1985 (Scalia, J., dissenting).
51 *Id.* at 1983 (majority opinion).
52 *See id.* at 1992 (Kennedy, J., dissenting).
53 *See id.* at 1982 (majority opinion).