Journal of Civil Rights and Economic Development

Volume 21
Issue 2 *Volume 21, Spring 2007, Issue 2*

Article 3

March 2007

Facts on the Ground and Federalism in the Air: The Solicitor General's Effort To Defend Federal Statutes During the Federalism Revival

Barbara D. Underwood

FACTS ON THE GROUND AND FEDERALISM IN THE AIR: THE SOLICITOR GENERAL'S EFFORT TO DEFEND FEDERAL STATUTES DURING THE FEDERALISM REVIVAL

BARBARA D. UNDERWOOD*

In 1998, when I joined the Office of the Solicitor General as Principal Deputy, the Supreme Court had recently launched what has come to be called the federalism revival by striking down federal statutes in four doctrinal categories. First, the Court had found an anti-commandeering principle in the Tenth Amendment, which literally says only that the states and the people still have any powers not taken away from them;[1] that principle led the Court to strike down laws about the disposal of radioactive waste[2] and about background checks on gun buyers.[3] Second, the Court had found new limitations on the commerce power,[4] which led it to strike down a law creating gun-free zones

* Counsel to the United States Attorney, Eastern District of New York; former Principal Deputy and Acting Solicitor General of the United States. Prepared for Conference on Federalism Past, Federalism Future, St. John's University School of Law, Queens, New York, March 3, 2006. The views expressed in this essay are those of the author and do not purport to reflect the views of the Department of Justice.

1 U.S. CONST. amend. X reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2 *See* New York v. United States, 505 U.S. 144, 149, 155, 177 (1992) (invalidating federal statute compelling the states to regulate the disposal of radioactive waste on ground that statute violates the principle of state sovereignty reserved by the Tenth Amendment).

3 *See* Printz v. United States, 521 U.S. 898, 919, 933 (opinion of the Court), 935-36 (concurring opinion of Justice O'Connor), 936 (concurring opinion of Justice Thomas) (1997) (invalidating federal statute requiring state and local law enforcement officers to perform background checks on prospective handgun owners on ground that statute violates Tenth Amendment principle of state sovereignty).

4 *See* U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes").

around schools.[5] Third, the Court had found a broad principle of state sovereign immunity in the Eleventh Amendment, which literally says only that a citizen of one state may not sue another state;[6] that principle led the Court to strike down a law giving Indian tribes the right to sue a state to compel negotiation over casinos.[7] And fourth, the Court had found new limitations on the power of Congress to enforce the Fourteenth Amendment's guarantees of due process and equal protection[8] and struck down the Religious Freedom Restoration Act.[9]

It was as if a floodgate had opened, or a tidal wave was coming, and no federal statute was safe. The task of defending the constitutionality of federal statutes in the Supreme Court falls to the Solicitor General.[10] Facing the prospect of many more challenges to federal statutes, the Solicitor General and his staff needed to think about how to hold the line, or where and how to draw a defensible line that would preserve some statutes against the federalism attack. Several tools were available, and all of them were used. First, of course, was reasoned argument: the effort to understand the logic behind the developing doctrine and to limit its application by drawing distinctions. Another

[5] *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (invalidating statute on the ground that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce" and the statute did not require any other "concrete tie to interstate commerce").

[6] U.S. CONST. amend. XI reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[7] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72, 76 (1996) (holding that Congressional power to regulate Indian affairs does not include the power to abrogate the sovereign immunity of the states protected by the Eleventh Amendment).

[8] U.S. CONST. amend. XIV reads in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[9] *See* City of Boerne v. Flores, 521 U.S. 507, 533 (1997) (invalidating statute as beyond the enforcement power of Congress because its preventive and remedial measures lack "proportionality or congruence between the means adopted and the legitimate end to be achieved").

[10] The Solicitor General has the statutory obligation to "assist the Attorney General in the performance of his duties." 28 U.S.C. § 505 (2006). Department of Justice regulations provide that the Solicitor General is responsible for "[c]onducting, or assigning and supervising, all Supreme Court cases," 28 C.F.R. § 0.20(a) (2006), and "authoriz[ing] intervention by the Government in cases involving the constitutionality of acts of Congress." 28 C.F.R. § 0.21 (2006).

important tool was to enlist the support of the states; many states filed briefs *amicus curiae* in support of federal statutes, explaining that they welcomed the assistance provided by the federal statutes at issue and did not regard these statutes as intrusions on state prerogatives.[11] Still another tool was to select cases for Supreme Court review that would present the statutes in the most favorable light, choosing from among the many available lower court cases those with the most sympathetic facts.[12]

Choosing suitable cases for Supreme Court review is a subject that is regularly considered by the Solicitor General's Office and not just in controversial constitutional litigation. It is known as the "vehicle" question: in responding to a petition for certiorari, or in deciding whether to file one, the Solicitor General is likely to consider both whether the question presented is worthy of Supreme Court review, and whether the particular case is a good vehicle for presenting that question to the Court. In fact, the Supreme Court from time to time calls for the views of the Solicitor General on petitions for certiorari in cases where the United States is not a party, cases involving private litigants and state and local governments. In these cases the Solicitor General's most important contribution can sometimes be to explain that even though the question identified by the parties is worthy of Supreme Court review, the case does not really present it squarely, because procedural obstacles or factual complications may prevent the Court from addressing it.

In defending a federal statute, however, the Solicitor General's interest in selecting cases may be not just to find a case that presents the issue squarely but rather to find a case that presents the government's position in the most favorable light. That is precisely what some of us began trying to do in some of the federalism cases.

[11] For a discussion of the active role of the New York State Attorney General in this process, *see* Preeta Bansal, *The Federalism Revival and Reinvigorating the "Federalism Deal,"* 21 ST. JOHN'S J.L. COMM 447 (2006).

[12] For the reflections of then-Solicitor General Seth Waxman on case selection strategy in federalism cases, see Seth P. Waxman, *Symposium: Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115 (2001). I am indebted to Mr. Waxman not only for his thoughtful discussion of this subject, but also for the extraordinary opportunity to participate in these cases and others as his deputy from 1998 to 2001.

It might be thought that the facts of the case before the Court would have little influence on the decision of a federalism issue, because in deciding such issues the Court draws largely on its view of general constitutional principles concerning the structure of government. A recent commentator has suggested, however, that the recent federalism cases should be viewed as expressing not the Court's view about fundamental structural questions, but rather its view that Congress has "gone too far" in certain areas of law and needs to be reined in.[13] If that suggestion is correct, then the facts of the federalism cases may indeed have been critical. A determination of whether Congress has gone "too far" is very likely to be influenced by the facts of a case. For a Court that was really asking that question, the choice of a factual setting could have an important effect on the outcome, and an effort to find cases with favorable facts was well worth making.

Of course, the Solicitor General is not always able to influence the selection of the case that brings an issue before the Court, because the decisions of other actors and accidents of timing may interfere. Private parties and state governments may file petitions for certiorari in cases with less than ideal facts. Cases with less attractive facts may move through the courts of appeals and become ripe for Supreme Court review before a more attractive case reaches that stage. But in the line of cases presenting an Eleventh Amendment challenge to the enforcement of various anti-discrimination laws against the states, the cases in the lower courts were so numerous that it seemed possible to use a little case selection strategy.

The Eleventh Amendment cases had their origin in *Seminole Tribe v. Florida*.[14] In that case, the Court held that Congress could authorize suits against the states only when it was enforcing the various guarantees contained in the Fourteenth Amendment; otherwise the states were protected by something that became known as Eleventh Amendment immunity.[15] This holding opened the door to a vast amount of litigation challenging the application of various federal anti-discrimination statutes to the states. Under *Seminole Tribe* it was possible for

[13] *See* Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142 (2002).

[14] 517 U.S. 44 (1996).

[15] *Id.* at 76.

the states to argue that these statutes did not qualify as enforcement of the equal protection clause or any other clause of the Fourteenth Amendment, and therefore the statutes could not remove the states' Eleventh Amendment immunity. To be sure, not all states sought to invoke this immunity; to the contrary, many states welcomed federal enforcement, but it only takes one to raise the issue, and some state was generally eager to go forward with this claim.

It was widely believed that in this group of statutes the Age Discrimination in Employment Act of 1967[16] would be the hardest to defend. Under *Seminole Tribe* the statute could be applied to the states only if it was a valid exercise of congressional power to enforce the Fourteenth Amendment, and the Court had not been receptive to claims that age discrimination by the government violated the Fourteenth Amendment. Indeed, each time the Court had considered a constitutional challenge to age discrimination, it had rejected the challenge.[17]

In order to present the Age Discrimination statute in its best light, it would have been helpful to find a case involving particularly irrational and harmful age discrimination, the kind of case that was described in the legislative history as motivating the act. An ideal case might have been one in which a person in his forties had lost his job because his company went out of business, and he was then unable to find a new job because he was regarded as too old. Unfortunately, no such case appeared among those then working their way through the courts of appeals.

Instead, a case with much less appealing facts was heading inexorably toward the Supreme Court – the case that became *Kimel v. Florida Board of Regents*.[18] The Eleventh Circuit had consolidated three cases under the Age Discrimination in Employment Act, and held that all three claims were barred by

16 29 U.S.C. §§ 621-634.

17 *See* Gregory v. Ashcroft, 501 U.S. 452, 470-73 (1991) (upholding mandatory retirement age of seventy for state judges); Vance v. Bradley, 440 U.S. 93, 109-12 (1979) (upholding mandatory retirement age of sixty for federal Foreign Service officers); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 314-17 (1976) (upholding mandatory retirement age of fifty for state police officers).

18 528 U.S. 62 (2000).

the Eleventh Amendment immunity of the states.[19] In one case, two state college professors in their fifties claimed, among other things, that their college had increased its requirements for academic credentials and publications and was paying more to new young teachers who met these standards than to older faculty members who did not.[20] In the second case, a group of faculty members at another state university claimed that the state had reneged on a promise to make certain market adjustments to salaries, and this failure had a greater impact on older employees because their wages were further below the market than those of younger employees.[21] In the third case, a state corrections officer who had suffered a heart attack claimed he was not promoted in part because he could not climb the stairs to a tower in the prison, and he claimed this constituted age discrimination.[22]

The facts of these cases had no formal relevance to the legal question before the Court, because the Eleventh Circuit had held that a state had Eleventh Amendment immunity to all claims brought under the Age Discrimination in Employment Act.[23] Indeed, the Supreme Court opinion affirming that holding did not devote much space to discussing the particular facts of these cases.[24] Nonetheless, the facts of these cases cannot have escaped the attention of the Court. At a minimum, the facts were unlikely to exert any pressure on the Court to find a way to uphold the statute.

Once certiorari had been granted in *Kimel*, it was necessary for the Solicitor General's Office to pursue two somewhat contradictory goals at the same time. The first goal was to defend the statute as a legitimate exercise of Congress's power to

19 *Id.* at 66.

20 *Id.* at 69; Complaint of Roderick MacPherson, et al., Joint Appendix Nos. 98-791, 98-796, pp. 21-25.

21 *Id.* at 70; Complaint of J. Daniel Kimel, et al., Joint Appendix Nos. 98-791, 98-796, pp. 42-45.

22 *Id.* at 70; Complaint of Wellington N. Dickson, Joint Appendix Nos. 98-791, 98-796, pp. 83-106. The corrections officer claimed the state's failure to promote him constituted not only age discrimination but also disability discrimination; the state's argument that the Disabilities Act claim was barred by Eleventh Amendment immunity was separately presented to the Supreme Court, which granted and then dismissed the state's petition for certiorari on that question. *See* Fla. Dep't of Corr. v. Dickson, 528 U.S. 1132 (Jan. 21, 2000) (granting cert.), and 528 U.S. 1184 (Feb. 23, 2000) (dismissing cert.).

23 *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66 (2000) (describing ruling below).

24 *See generally id.*

enforce the equal protection clause by preventing and remedying unconstitutional age discrimination. The second goal was to confine any adverse decision to this one statute, to avoid an opinion that would imply that the next statutes coming up for review were also unconstitutional. I argued and lost *Kimel* in the 1999 Term; the Court held that Congress had not identified any pattern of unconstitutional age discrimination by the states that required a legislative remedy.[25] It seemed possible that this was a limited loss – one that rested on the very limited record compiled by Congress showing age discrimination by state employers, and the fact that the Court seemed to have trouble thinking of age discrimination as unconstitutional. The next case proved that the holding was not so limited.

The next statute to face an Eleventh Amendment challenge in the Supreme Court was Title I of the Americans with Disabilities Act of 1990.[26] Because Congress had assembled a massive record of discrimination against people with disabilities, it seemed possible that with the right facts the statute could be saved. Fortunately the case about depressed government workers who wanted a reduced workload did not reach the Court, but certiorari was granted in a pair of cases with facts that were not much more compelling. The first case was the corrections officer with the heart condition – the same man who had litigated and lost his age discrimination claim in *Kimel*. The Eleventh Circuit had held that the state was immune to his Age Discrimination Act claim but not to his Disabilities Act claim, and on the Disabilities Act ruling the Supreme Court granted the state's petition for certiorari.[27] Four days later the Court granted certiorari in the case of a would-be police officer whose nearsightedness could not be completely corrected with glasses, and the Court consolidated the two cases for argument.[28]

These facts did not look promising for the defense of the Act because they involved public safety. In fact they seemed so unfavorable that some of the private disability rights organizations supporting the statute decided to try to promote

25 *Id.* at 89.

26 42 U.S.C. §§ 12111–12117.

27 Fla. Dep't of Corr. v. Dickson, 528 U.S. 1132 (Jan. 21, 2000) (granting cert.).

28 Alsbrook v. Arkansas, 528 U.S. 1146 (Jan. 25, 2000) (granting cert. and consolidating case with *Dickson* for argument).

the settlement of those cases, and apparently they succeeded. Both petitions were dismissed at the request of the petitioners.[29]

Meanwhile a case with much more attractive facts had become available – the case that eventually became known as *Board of Trustees of the University of Alabama v. Garrett*.[30] The director of nursing for obstetrics and gynecology at a state hospital had been successfully treated for breast cancer and returned to work without any limitation on her activities. She was nevertheless demoted to a lower-ranking position because of her illness.[31] Her case was consolidated with that of a security guard with asthma and sleep apnea, who had asked to minimize exposure to cigarette smoke and asked for daytime shifts in accordance with his doctor's recommendations.[32] The state refused, and he filed a claim with the Equal Employment Opportunity Commission. He then began to get negative performance evaluations.[33] Both employees filed Disabilities Act claims, and the district court held that the claims were barred by the state's Eleventh Amendment immunity. The Eleventh Circuit reversed, and the state filed a petition for certiorari.[34] The case of the nurse, who was completely capable of doing her high-ranking job, and had apparently been demoted only because of prejudice against cancer survivors,[35] seemed particularly attractive in light of Justice O'Connor's well-known personal experience with breast cancer.[36] The Court took the case,[37] and invalidated the statute as applied to the states by a vote of five to four, with Justice O'Connor in the majority.[38] Maybe that proves there really was an important legal principle at stake here, and it could not be

29 Fla. Dep't of Corr. v. Dickson, 528 U.S. 1184 (Feb. 23, 2000) (dismissing cert.); Alsbrook v. Arkansas, 529 U.S. 1001 (Mar. 1, 2000) (dismissing cert.).

30 531 U.S. 356 (2001).

31 *Id.* at 362.

32 *Id.*

33 *Id.*

34 *Id.* at 362–63.

35 *Id.*

36 *See* JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 186-91 (2005) (noting that Justice O'Connor first spoke publicly about her 1988 experience with breast cancer in 1994, and that she had returned to work at the Court ten days after breast cancer surgery).

37 529 U.S. 1065 (April 17, 2000) (granting cert.).

38 531 U.S. 356 (2001). The opinion of the Court was written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas.

trumped by facts. Or maybe the facts were not quite compelling enough.

At that time there was another case in the pipeline that seemed to present very strong facts for defending the Disabilities Act. In this case, which ultimately became *Tennessee v. Lane*,[39] a paraplegic in a wheelchair had been the defendant on trial at a courthouse without an elevator, and as a result the paraplegic had crawled up the courthouse steps to get to his own trial. While the facts were compelling, the case was not ripe for Supreme Court review in the spring of 2000, when the Court was selecting cases that presented the claim that Disabilities Act claims against the states were barred by the Eleventh Amendment. The Sixth Circuit had reserved decision, awaiting the outcome of the Disabilities Act cases in the Supreme Court.[40]

As it turned out, the Court in *Garrett* ruled only on the part of the statute prohibiting disability discrimination in employment, and expressly reserved for another day the part of the statute dealing with disability discrimination in public programs, services, and facilities.[41] By the time the Court was ready to consider the rest of the statute, the Sixth Circuit had finally decided the case about the paraplegic on the courthouse steps. The Court granted certiorari, and that became the case to present the constitutionality of Title II of the Disabilities Act, concerning access to public facilities.[42] I was no longer in the Solicitor General's Office by then, but I am sure the lawyers there were delighted to have the statute go back to the Court on those facts.

In *Tennessee v. Lane*,[43] the Supreme Court rejected the state's claim of immunity and upheld the enforcement of the Disabilities Act against the state.[44] There can be no doubt that the facts had an effect on the outcome in that case. The image of a defendant crawling up the courthouse steps must have been unbearable for

39 541 U.S. 509 (2004).

40 *See* Lane v. Tennessee, 315 F.3d 680, 681-82 (6th Cir. 2003) (amended opinion) (explaining that Court of Appeals had issued its initial opinion on July 16, 2002, benefiting from guidance provided by Supreme Court's opinion in *Garrett* and its own subsequent en banc decision in another case).

41 531 U.S. at 360 n.1.

42 Tennessee v. Lane, 539 U.S. 941 (2003) (granting cert. limited to ADA issue).

43 541 U.S. 509 (2004).

44 *See id.* at 531–34 (upholding statute as valid exercise of congressional power to abrogate state sovereign immunity).

the Court, or at least for Justice O'Connor, who silently joined the *Garrett* dissenters in rejecting the state's claim of immunity and upholding the portion of the Disabilities Act at issue in that case.[45] The Court explains its holding in doctrinal terms as the result of heightened scrutiny because access to justice is at stake, upholding the statute as applied to access to courts and leaving parks, playgrounds, schools, and zoos for another day.[46] To this observer, however, it seems likely that the decision resulted not only from the analysis of legal doctrine but also, and more importantly, from the powerful and unbearable image of a man crawling up the courthouse steps. So maybe facts matter after all.

Another recent case rejecting a federalism challenge may also be explained by its compelling facts. In *Nevada Department of Human Resources v. Hibbs*,[47] the Court upheld the part of the Family and Medical Leave Act of 1993,[48] which requires state employers, like other covered employers, to give twelve weeks of leave for the care of a sick family member, and to pay damages for a violation. The Court held that this law was a proper exercise of Congress's power to enforce the equal protection clause and to prevent and remedy sex discrimination.[49] The Court recognized that the law was written to protect both women and men from stereotypes about family care-taking.[50] Women were protected because they most often carry the burden of being their family's caretakers, and might for that reason suffer employment discrimination.[51] Men were protected because they must battle stereotypes if they need or want to care for a sick family member.[52]

45 *See id.* at 513-14 (discussing facts of case).

46 *See id.* at 533 n.20 (stating that "[b]ecause this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*'s prohibition on irrational discrimination").

47 538 U.S. 721 (2003).

48 29 U.S.C. §§ 2601–2654 (2006).

49 *See Hibbs*, 538 U.S. at 740 (finding FMLA "congruent and proportional to its remedial object").

50 *See id.* at 736 (noting that "stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men").

51 *See id.* at 740.

52 *See id.* at 731 (explaining that prior to FMLA men were subject to discrimination when requesting leave to care for family members).

Hibbs can be understood in purely doctrinal terms: like *Lane*, it involves a category that triggers heightened scrutiny, here sex discrimination and there access to justice. Therefore, the Court was more willing in each of these cases to perceive discrimination and to find the congressional remedy appropriate. But like *Lane*, *Hibbs* can also be explained by its facts – a husband had sought leave to care for his wife, who had been seriously injured in an automobile accident.[53] The facts are compelling on two levels. First, American society depends on family members to take care of each other. Second, the case involved a male caregiver, and encouraging male caregivers is widely seen as essential to reaching equality of the sexes in the workplace and at home.[54] I think the Court found it unbearable to tell Hibbs not to care for his injured wife, just as it was unbearable to tell Lane to crawl up the courthouse steps.

Some have suggested that *Hibbs* and *Lane* mark a doctrinal shift – the end of the federalism revival. Perhaps their doctrinal significance is not so substantial; perhaps they simply show what can happen when the Court is presented with irresistible facts.

[53] The fact that the plaintiff was male may be important. Several leading sex discrimination cases litigated by now-Justice Ruth Ginsburg before she became a judge were brought on behalf of male plaintiffs who were disadvantaged by a pension or benefit scheme that assumed women were dependent on their husband's benefits, but men did not need benefits from their wives. *See* Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

[54] For a thoughtful discussion of the possibility that *Hibbs* may be better explained by changing cultural and social norms than by doctrinal analysis, see Joan C. Williams, *Symposium: Women's Work is Never Done: Employment, Family, and Activism: Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 73 U. CIN. L. REV. 365 (2004).