

The Voting Rights Act: Does the *City of Boerne* case or the “congruence and proportionality” test have anything to do with the Voting Rights Act?

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Much of the debate in the pending *Shelby County* case centers on whether the remedy in Section 5 of the Voting Rights Act is “congruent and proportional” to the evidence of violations, as the Supreme Court first began requiring in 1997 in *City of Boerne v. Flores*. However, simply reading *City of Boerne* and the cases following it suggests that this is not the right test for evaluating the constitutionality of Section 5, and that applying it would be wholly without precedent.

That may surprise some people who believe – mistakenly – that the Supreme Court has already held that Section 5 must meet a test of “congruence and proportionality.” One such surprised person would be Chief Justice Roberts, who thought (Tr. Oral Arg. 56) the Court applied that test in the 2009 case of *N.W. Austin MUD v. Holder*. One party in that case did say that test should be applied, but the Court specifically said it wouldn’t address the issue and decided the case on other grounds.

The point is straightforward. Congress’ 14th amendment power (and possibly its 15th amendment power – it’s not clear) is solely to “enforce” the amendment’s substantive requirements. In the *City of Boerne* case and every one of the cases following it, the Supreme Court has applied the “congruence and proportionality” test for one purpose -- solely to identify and weed out laws that go beyond Congress’ enforcement power because they are “substantive” rather than “remedial.”

Section 5, of course, is plainly remedial – and the Supreme Court has said so several times – so the only question is whether it is too remedial. Therefore, the reason underlying every use of “congruence and proportionality” up to now has no relevance at all to Section 5. That doesn’t mean the Supreme Court couldn’t come up with a theory for why “congruence and proportionality” is a good idea here too, but it would have to acknowledge that it was doing something wholly new and unprecedented.

Discussion

1. “Congruent/proportional” has been used only to divide remedial from substantive laws.

Fifteen years ago, the Supreme Court began a line of cases limiting Congress’ power under the 14th Amendment where the Court found that a statute enacted by Congress’ was not “congruent and proportional” to the evil it was aimed at. The cases began with *City of Boerne v. Flores*, 521 U.S. 507 (1997), and have included five more cases since then which have held specific congressional enactments to be unjustified by

the equal protection clause or due process clause,¹ and three cases where statutes were upheld because they were found to be remedial rather than substantive.²

The words “congruent and proportional” are not in the Constitution but were adopted as a gloss for the constitutional words “appropriate legislation.” The Court was careful to explain that “appropriate legislation” under the 14th Amendment must be faithful to the “remedial” nature of the amendment. The amendment gives Congress power to enforce its protections – equal protection and due process – but not to define those protections. To define the protections would be a substantive function, and that is for the judiciary alone:

“Congress’ power under Section 5, however, extends only to ‘enforc[ing]’ the provisions of the Fourteenth Amendment. This Court has described this power as ‘remedial.’ *South Carolina v. Katzenbach*. . . . Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.” *Boerne*, 521 U.S. at 519.

The distinction between remedial statutes (permissible) and substantive statutes (forbidden) was not new. It had been the basis of the *Civil Rights Cases*, 109 U.S. 3 (1883), where the Supreme Court said the 14th amendment, by authorizing Congress to “enforce” the amendment, had limited Congress’ power to enact “corrective” laws.

It was against this background that the Court adopted its “congruent and proportional” test, not as a free-ranging inquiry into Congress’ work-product or process, but solely as a prophylactic to guard against congressional slipping from the permissible “remedial” law to the impermissible “substantive” law. The Court made this limited purpose and application of its new test clear from the start:

“There 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.” *Boerne*, 521 U.S. at 520.).

This crucial distinction has been maintained as the explicit basis for the holdings of unconstitutionality in each of the five post-*Boerne* cases which struck down laws for failing the “congruent and proportional” test:

In *Kimel*, the Court said the question was whether the Age Discrimination in Employment Act (ADEA) was “an appropriate remedy or merely an attempt to substantively redefine” the states’ constitutional obligations. 528 U.S. at 88. In *Garrett*,

¹ *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Florida Prepaid Postsecondary Educ. Exp. Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *U.S. v. Morrison*, 529 U.S. 598 (2000); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327 (2012).

² *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 541 U.S. 509 (2004); *United States v. Georgia*, 546 U.S. 151 (2006).

“to uphold the ADA’s application to the states would allow Congress to rewrite the Fourteenth Amendment.” 531 U.S. at 356. In *Coleman*, the task was “to insure Congress’ enforcement powers under §5 remain enforcement powers, as envisioned by the drafters of the Amendment, rather than powers to redefine the scope of section 1.” 132 S.Ct. at 1333. In *Florida Prepaid*, the Court said the question was whether the Patent Remedy Act could be viewed as a proper remedial or preventive act, 527 U.S. at 639, and in *Morrison*, the Violence Against Women Act was condemned as not being “corrective in its character.” 529 U.S. at 625-26.

But Section 5 of the Voting Rights Act leaves no doubt of its remedial nature, at the time of its enactment and now. Its language and operation are remedial. The Supreme Court itself has repeatedly cited the Act as the classic remedial statute. The 2006 extension of Section 5 continues to apply as it has in the past, with the same judicially-fashioned substantive law. Since there is no question as to the remedial nature of the law, there is no basis in Supreme Court precedent for applying the “congruent and proportional” test.

2. Congress has broad power to choose remedies that are completely effective.

The *Shelby County* debate in the Supreme Court was largely framed as a “sufficiency of the evidence” question, as in reviewing a lower court verdict – did Congress in 2006 have a record of enough voting discrimination in the covered jurisdictions to warrant the strong remedy of Section 5 preclearance. Or, as Shelby County’s lawyer put it, “is this killing a fly with a sledgehammer?” Tr. Oral Arg., 28.

Such a claim of “too much enforcement” is a question of what is “necessary and proper” or “appropriate legislation,” which are not open-ended terms but have been defined largely in terms of what will be effective to carry out the constitutional task.

The Voting Rights Act is measured by the “necessary and proper” clause and the “appropriate legislation” clause. Article I gives Congress power to “make all laws which shall be necessary and proper” to carry out all powers “vested by this Constitution in the Government of the United States.” The 14th and 15th amendments give Congress power to enforce those amendments “by appropriate legislation.”

These words have been broadly read in many well-known Supreme Court cases. In *McCulloch v. Maryland* (1819), the Supreme Court said “necessary and proper” does not mean indispensable, but includes all means suitable for carrying out the power given to Congress. 4 Wheat at 420-21.

In *Ex parte Virginia*, the Court said “appropriate” legislation is “whatever tends to enforce submission to the prohibitions they [the amendments] contain, and to secure to all persons the enjoyment of perfect equality of civil rights.”

In *James Everard’s Breweries v. Day*, 265 U.S. 545 (1924), the Supreme Court broadly interpreted Congress’ power under the 18th amendment (Prohibition) which, like

the 14th and 15th amendments, authorized Congress to “enforce” the amendment by “appropriate legislation.”

Then, noting that the purpose of the 18th amendment was “to suppress the entire traffic in intoxicating liquor as a beverage,” the Court said Congress “in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution.”

Finally, the Court made clear where the Constitution draws the line between legislative and judicial authority when the question is the degree of the problem and the choice of the remedy:

“It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground.”

“It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any eligible and appropriate means to make that prohibition effective.”

3. The 14th & 15th amendments mean to eliminate vote discrimination, not just diminish it.

There are suggestions that a diminution of egregious voting discrimination in the covered jurisdictions is a cause for loosening up the Section 5 remedy. The Supreme Court has repeatedly stated that in dealing with the Nation’s greatest evil, the goal is not partial success. Congress is empowered and obligated to do more, as are the courts.

In *Ex parte Virginia*, 100 U. S. 339, 345–346 (1880), the Supreme Court explicitly described the purpose of the Civil War amendments, to secure “perfect equality of civil rights.”

In *Oregon v. Mitchell*, the Court said:

“[T]he Civil War amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.” 400 U.S. 110, 127 (1970).

And in *Louisiana v. United States*, the Supreme Court said:

“We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.” 380 U.S. 145, 154 (1965).

The decision in the *Shelby County* case is imminent, and it is uncertain how the Court will decide the fate of a key provision of the Voting Rights Act. But one thing is

clear: the ‘congruent and proportionality’ test laid out in *City of Boerne* and subsequent line of cases is not the right test for evaluating the constitutionality of Section 5, and applying that test in this case would be wholly without precedent.