Civil Rights Actions

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CIVIL RIGHTS ACTIONS

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A COMPLETE SYNOPSIS FOR EACH CHAPTER APPEARS AT THE BEGINNING OF THE CHAPTER

(Rel. 49-6/2010 Pub.199)

SPECIAL ALERT 3A

This text should be appended at the end of ¶ 3.21 on Page 3-271

The Supreme Court marked the limits of its holding in *Hibbs* in *Levin v. Commerce Energy, Inc.*,[65] in an opinion by Justice Ginsburg, who also wrote the majority opinion in *Hibbs*. The case arose out of how Ohio taxes the distribution of natural gas. Originally, all natural gas consumers in Ohio purchased natural gas from public utilities known as local distribution companies. The companies not only sold but also distributed the gas. A consumers dealing with a local distribution company purchased a bundled product of both gas and its delivery. More recently, consumers in Ohio's major metropolitan areas had the choice of contracting with independent marketers. The independent marketers compete with the local distribution companies for the retail sale of natural gas but not its distribution. As a result, consumers using an independent marketer purchase two products, the natural gas from the independent marketer and its delivery from the local distribution company.

The plaintiffs in *Levin* were two independent marketers and a consumer who purchased natural gas from one of the plaintiff marketers. Their suit focused on three tax exemptions that Ohio afforded to local distribution companies but not independent marketers.[66] They alleged that the discriminatory taxation of independent marketers and their customers violated the Commerce and Equal Protection Clauses. In an action instituted in federal district court against the Tax Commissioner of Ohio, plaintiffs sought declaratory and injunctive relief invalidating the three tax exemptions and ordering the Commissioner to stop recognizing and enforcing them.

The district court granted the Commissioner's motion to dismiss. The district court held that the Tax Injunction Act did not deprive the court of jurisdiction because the plaintiffs, like the plaintiffs in *Hibbs*, were third parties challenging another's tax benefit and their requested relief would increase, not decrease the amount of tax revenue collected by the state. Nonetheless, as a matter of comity, the district court declined to exercise jurisdiction. The court noted that granting the requested relief would require the state to collect taxes which the legislature had not imposed. A state court, by contrast, would have the option of extending the exemptions to the

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[65] ___ U.S. ___, 130 S. Ct. 2323; 176 L. Ed. 2d 1131 (2010).

[66] Ohio affords [local distribution companies] three tax exemptions that [independent marketers] do not receive. First, [local distribution companies'] natural gas sales are exempt from sales and use taxes. . . . [Local distribution companies] owe instead a gross receipts excise tax . . . which is lower than the sales and use taxes [independent marketers] must collect. Second, [local distribution companies] are not subject to the commercial activities tax imposed on [independent marketers'] taxable gross receipts. . . . Finally, Ohio law excludes inter-[local distribution company] natural gas sales from the gross receipts tax, which [independent marketers] must pay when they purchase gas from [local distribution companies].

Id. at 2328.

independent marketers—a remedy could not be granted by a federal court because of the Tax Injunction Act.

The Sixth Circuit reversed. Although the court of appeals agreed that the plaintiffs' action was not barred by the Tax Injunction Act, it rejected the district's ruling on comity. The appellate court concluded that the district court's reliance on comity was foreclosed by a footnote in *Hibbs*, in which the Supreme Court stated it had relied upon principles of comity to preclude original federal-court jurisdiction "only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection."[67] The court contended that a broad reading of the comity cases would render the Tax Injunction Act superfluous and would be inconsistent with important Supreme Court cases upholding federal-court jurisdiction over actions that resulted in the collection of additional tax revenues. It remanded the case to the district court for adjudication on the merits.

The Supreme Court held that comity precludes the exercise of original federal-court jurisdiction over a taxpayer's complaint about allegedly discriminatory state taxation framed as a request to increase a competitor's tax burden when an adequate state-court forum is available to hear and decide the taxpayer's constitutional claims. The Court distinguished *Lewis* from *Hibbs* on three interrelated bases.

First, unlike the plaintiffs' action in *Hibbs*, the plaintiffs' action in *Lewis* did not involve "any fundamental right or classification that attracts heightened judicial scrutiny."[68] Rather, plaintiffs were challenging economic regulation over which the states have "wide regulatory latitude."[69]

Second, "when unlawful discrimination infects tax classifications or other legislative prescriptions, the Constitution simply calls for *equal treatment*."[70] Whether that equality is achieved by striking down the exemption enjoyed by the defendant or extending the exemption to the plaintiff "is a matter on which the Constitution is silent."[71] That choice is one that should be left on an interim basis to the state courts and ultimately to the state legislature.

> If lower federal courts were to give audience to the merits of suits alleging uneven state tax burdens, however, recourse to state court for the interim remedial determination would be unavailable. That is so because federal tribunals lack authority to remand to the state court system an action initiated in federal court. Federal judges, moreover, are bound by the [Tax Injunction Act]; absent certain exceptions . . . the Act precludes relief that would diminish state revenues, even if such relief is the remedy least disruptive of the state legislature's design. These limitations on the remedial competence of lower federal court counsel that they

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[67] Hibbs v. Winn, 542 U.S. 88, 107 n.9, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004).

[68] 130 S. Ct. at 2336.

[69] *Id.*

[70] *Id.* at 2333 (emphasis in original).

[71] *Id.* at 2334.

> refrain from taking cases of this genre, so long as state courts are equipped fairly to adjudicate them.[72]

In *Hibbs*, on the other hand, if the district court found that the Arizona tax credit violated the Establishment Clause, the only available remedy would be invalidation of the tax credit, which would increase state tax revenues.[73]

Third, the plaintiffs in *Hibbs* were third parties whose own tax liability was not a relevant factor. "In this case, by contrast, the very premise of [plaintiffs'] suit is that they are taxed differently. . . . Unlike the *Hibbs* plaintiffs, [plaintiffs in this case] do object to their own tax situation, measured by the allegedly more favorable treatment accorded [local distribution companies]."[74]

Speaking directly about the footnote in *Hibbs* on which the Sixth Circuit relied, the Court stated that it had not intended to diminish the force of the comity doctrine. Rather, the *Hibbs* footnote on comity

> is most sensibly read to affirm that, just as the case was a poor fit under the [Tax Injunction Act], so it was a poor fit for comity. The Court, in other words, did not deploy the footnote to recast the comity doctrine; it intended the note to convey only that the Establishment Clause-grounded case cleared both the [Tax Injunction Act] and comity hurdles.[75]

Having found that comity justified dismissal of the plaintiffs' federal-court action, the majority did not decide whether the Tax Injunction Act likewise would have prevented the plaintiffs' action.[76]

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[72] *Id.* at 2336.

[73] *Id.* at 2335.

[74] *Id.* at 2335–36.

[75] *Id.* at 2336–37.

[76] *Id.* at 2337.

Justice Kennedy wrote a separate concurring opinion. Although Justice Kennedy considered the rationale of *Hibbs* "doubtful," he joined in the Court's opinion because it did not expand the holding in *Hibbs*. *Id.* at 2337 (Kennedy, J., concurring).

Justice Alito concurred separately. He agreed that principles of comity barred the action, but he also was "doubtful" about the Court's efforts to distinguish *Hibbs*. "[W]hether today's holding undermines *Hibbs*' foundation is a question that can be left for another day." *Id.* at 2339 (Alito, J., concurring).

Justice Thomas also concurred in an opinion joined by Justice Scalia. Although he was "skeptical" of the Court's decision in *Hibbs*, he agreed that revisiting *Hibbs* was not required to conclude that the plaintiffs' action belonged in state court. He only concurred, however, because he would have dismissed the action on the ground that it was barred by the Tax Injunction Act. *Id.* at 2337–39 (Thomas J., concurring).

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