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FRANK DEALE

THE NEW FEDERALISM AND STATE IMMUNITY

Before discussing litigation strategy concerning racial justice claims against state entities, it is necessary to understand the extensive and rapid developments in the law under the “new Federalism.”

I see at least two wings of the new Federalism. One is sometimes referred to as the state sovereignty wing. It involves the many cases where the Supreme Court has prevented Congress from commandeering state governments to carry out federal mandates. The other is the state immunity wing, in which the Court is protecting state governments from litigation in state and federal court under federal causes of action which are designed to bring about social change. As a former litigator, my comments are directed primarily to issues surrounding state immunity.

In *Alden v. Maine*,¹ the Court’s holding that Maine workers could not enforce the provisions of the Fair Labor Standards Act in state court, signaled the total severance of the Court’s notion of states’ rights from the language of the Eleventh Amendment. By one vote majorities, the Court has used the Amendment to put in place the majority’s (the five new Federalists)² notions of common-law history and political reaction.

In its Eleventh Amendment jurisprudence, the Court is engaged in a form of rudderless constitutional adjudication which in its judicial activism far exceeds anything accomplished by the Warren Court. Yet to fully understand its impact on the litigation of racial justice claims in the federal courts, the Eleventh Amendment cases should be looked at along with the other cases which restrict access to the courts by people trying to effectuate social change. I refer primarily to the imposition of an intent requirement necessitating the showing of purposeful discrimination first upon the three great Reconstruction amendments, the Thirteenth, Fourteenth, and Fifteenth Amendments, and then upon the various Civil Rights statutes passed under their authority. Of course, such a requirement makes it exceedingly difficult for plaintiffs to prevail.

The Court has also narrowed the substantive reach of civil rights statutes, putting a cap on their expansion to encompass rights claimed by numerous

Frank Deale is Associate Professor of Law at CUNY Law School. He is a former Staff Attorney and Legal Director at the Center for Constitutional Rights, where he was involved in litigation concerning racial justice, labor rights, immigration, and the environment.

victims. For example, *Griffin v. Breckenridge*³ provided access to the courts for African Americans seeking damages for private racially motivated violence under 42 U.S.C. 1985(3). Over the years, women, workers and political activists tried to take advantage of this legislation. However, in derogation of the language of the statute, the Court has narrowly restricted its coverage to African-Americans, because historically they are the core group the statute was designed to protect.

The new Federalism represents a continuation of those ideas: limiting the powers of the federal judiciary to serve as an instrument for social change by making it more difficult for plaintiffs to win the substantive claims that they still are able to bring in the federal courts.

In this context, what remains of the effort to bring about racial justice through the federal judiciary in the era of the new federalism?

Because the Court still allows Congress to abrogate state immunity through legislation passed pursuant to Section 5 of the Fourteenth Amendment, there is room for Congress to take action to protect the groups that the five new Federalists feel the Fourteenth Amendment was designed to protect. The roots of the Fourteenth Amendment are found in the Civil War and Reconstruction Era, and consequently the framers of the Fourteenth Amendment were primarily focussed upon elevating the status of former slaves. Since Congress can still override state immunity pursuant to Section 5 of the Fourteenth Amendment, one can take the position that in light of the historic purpose of Section 5, the struggle of African Americans does not have to be set back by these new Federalism doctrines. The five new Federalists have not been so generous with congressional attempts to abrogate on behalf of the elderly or persons with disabilities, nor have they been willing to extend Congress' Section 5 powers to the Commerce Clause, the so-called Indian Commerce Clause, or the Article I Spending Power.

To the extent that racial justice claims are particularly egregious, recent decisions still authorize the United States government to bring litigation in the federal and state courts against state governments. As a consequence, political pressure can still be brought to bear to force the federal government to take legal action in appropriate circumstances

Finally, the Court continues to allow suits for prospective injunctive relief under *Ex Parte Young*.⁴ Certainly in the *Seminole*⁵ decision, the Court gave reason for concern that the prospective injunction doctrine of *Ex Parte Young* was losing its grounding because the Court in *Seminole* refused to allow the Seminole nation to use an injunctive theory to hold the state of Florida accountable for not engaging in dialogue with the tribe about gaming in the state of Florida. Nonetheless the doctrine seems to remain sound.

For these reasons, I think it is fair to say that as far as racial justice litigation goes, there is still some way to go before we hit the very bottom.

What if the worst does happen? What if federal litigation does become impossible? My final point is that the state courts and the state governments are still available. Historically, the Federalists were a fairly reactionary group. After the American Revolution, many of them remained loyal to the British government. It has only been since the Civil War, the Reconstruction era, and certainly the Civil Rights era, that the federal government has been looked on as a friend of people's struggles. During the period immediately following the Revolutionary War, there were many struggles taking place in the state legislative bodies to ease the war debts which were penalizing small land holders, and small business people. Some state legislatures became progressive legislative bodies. The battle between the Federalists and the so-called Anti-Federalists at that time was not necessarily a battle in which those seeking a powerful federal government were motivated by progressive social ideas.

As we know, after the Civil War, federal power was absolutely essential to breaking the back of the reactionary regimes still highly prevalent in the public and private sector of the South, through the mechanisms of the Thirteenth, Fourteenth and Fifteenth Amendments. But with the combined recent efforts of the new Right and their Federalist counterparts working hard at shutting the Federal Government down or using it to promote a new Right agenda, we should think about recasting our eyes on local struggles. There is already some support for this in the law and we should consider it in our politics. State constitutions across the country provide rights to education, rights to housing, and social welfare rights which don't appear anywhere in the United States Constitution. It may be that in the next fifty, sixty, or a hundred years the state legislatures are going to be the real battle ground for effecting some of those rights. The new Federalism is a disastrous thing for the particular historical moment we are living in now, but we can make the most of it. It may very well be that, for a while, local struggles are going to be the most important struggles.

NOTES

- 1 527 U.S. 706 (1999).
- 2 They are Chief Justice William Rehnquist and Associate Justices Antonin Scalia, Clarence Thomas, Anthony Kennedy and Sandra Day O'Connor.
- 3 403 U.S. 88 (1971).
- 4 209 U.S. 123 (1908).
- 5 *Seminole Tribe of Fla. vs. Florida*, 517 U.S. 44 (1996).