
WORKING PAPER SERIES

**THE VERY REAL THREATS TO THE
RIGHTS OF PUBLIC EMPLOYEES**

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November 2005

WPS 2005-SS-003
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The following is a speech presented Saturday, Nov. 5, 2005, during the conference “Preserving the Rights of Public Employees” sponsored by the UUP Human and Civil Rights Committee in cooperation with NYSUT, CSEA, OMCE and PEF.

THE VERY REAL THREATS TO THE RIGHTS OF PUBLIC EMPLOYEES: WHAT YOU DON'T KNOW CAN HURT YOU

Today we are focusing on a phenomenon sometimes known as “the new federalism.” The term “new federalism” has various meanings but, for the purposes of this discussion, it is used as shorthand to refer to a group of recent Supreme Court decisions which, among other things, are re-shaping interpretations of constitutional rights and governmental powers. As it happens, state employees, such as members of this audience, are the very people who so far have been most directly affected by these decisions and who, therefore, have felt or will in the future feel the brunt of them. These decisions constitute the worst kind of judicial activism.

First, a word about the word “federalism”: It sounds boring, doesn't it? How can anything as bland as federalism, new or old, be threatening? And that is a big part about how brilliant the Right is in its choice and use of language. Have you ever heard the expression “MEGO”? It stands for “My Eyes Glaze Over!” Thus, the new federalism or federalism generally are such innocuous sounding phrases that very few people pay attention to them or what they really represent.

As I will elaborate on further, the term federalism refers simply to a form of government in which there is a balance of power between the states and the central government. And that's all that federalism means. It is theoretically value neutral.

Federal governments can do a better job of serving their citizens and state governments may do

worse. Or *vice versa*. Among those of us who grew up in the civil rights era tend to think of preferring the power to be more concentrated in the state governments, sometimes known as “states' rights” as being something about preserving first slavery and later segregation. But, as I believe we may soon experience, it's really a matter of who controls the state governments, and who controls the federal government. As time goes by, if the Republicans remain in firm control of all branches of the federal government, progressives may have to begin to think in very different ways about how they feel about the balance of state and federal power.

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most directly the rights of state employees. They have done so under the guise of the “new” federalism. I’ll be talking to you about constitutional provisions and Supreme Court

decisions that affect you folks most directly, but, believe me, the rest of us are in the crosshairs of this issue as well and will, sooner or later be directly affected as well.

So, what does the “new” federalism mean? In short, it means whatever a majority of the Supreme Court says it means. As we shall see, it does not always mean more state power, though it often does. Its meaning really depends on who is exercising the power in question and to

what end. When I began working on this issue as Director of the Project on Federalism for NOW Legal Defense and Education Fund (since renamed Legal Momentum), I often felt like Alice in Wonderland in particular in *Through the Looking Glass*. I quote:

“When I use the word—Humpty Dumpty said, in a very scornful tone, it means what I choose it to mean, neither more nor less.

“The question is, said Alice, whether you *can* make words mean so many different things.

“The question is, said Humpty Dumpty, which is to be the master here and that is all.”¹

And that is in fact what has happened to the meaning of the term “federalism.” Many of the words that are used in the public discourse have lost the original meanings that we all understood them

to be and have come to mean what the “masters,” or the powers to be mean by these words. They no longer mean what many of us grew up with. Various words, not just federalism itself, but other favorite words and phrases used by the conservative movement, no longer mean what you think they mean. In the upcoming Supreme Court confirmation process, you will hear terms such as “strict construction,” “original intent,” “interpreting but not making the law” and “judicial restraint”—what “conservative” judges do, according to the Right and, therefore, good—versus “judicial activism”—what “liberal” judges do, also according to the Right and, therefore, bad.

Thus, a number of these terms and phrases have come to mean in the public mind exactly what right wing radicals say they mean. And because they can get away with this, because they have the power not simply to redefine language and terms in ways not reminiscent of Orwellian Newspeak, *e.g.*, “War is Peace”² for instance, but more fundamentally because they have the power. Period. Republicans control the presidency, the federal bureaucracy, both houses of Congress, a majority of the lower federal courts and, of course, the Supreme Court.

And they also control, or at least have successfully cowed, the media. Even the so-called mainstream media have accepted, or at least not challenged, the conservative meanings given to catch-phrases. There is no liberal or progressive equivalent to Fox News. Because the news media is always accused of having a liberal bias, it has, until the aftermath of the recent hurricanes, been fairly gutless. They tend to give equal weight to both sides of a story even when there is not actually an equal argument. For example, “most people think that the world is round,” but “here’s a whole group of people who think it’s flat” as though belief in the flat earth an equally defensible proposition. The media are owned by corporate conglomerates, and they tend to be fearful and pretty credulous.

So we're in an uphill battle, make no mistake about it. So what are they doing with this power? What's their long term agenda with respect to civil liberties, church state, reproductive rights, and affirmative action? All of these things are very important and for the most part beyond the scope of my talk and this conference. But obviously they are important things to keep in mind.

I am now going to be talking about the basic structure of government. As I do, keep in mind that there are two types of Constitutional cases, those involving individual rights and those involving government powers. Most people tend to think more often about those involving individual rights, for example, First Amendment rights, reproductive, civil rights, etc, individual rights. But the two are intertwined. The decisions we will discuss involve the second type, questions of governmental power. But this is often it about the power to recognize, define, and enforce rights that may not be directly mentioned in the Constitution, as interpreted by the Supreme Court to now. What branch or level of government has which powers, who has the power to define rights, and who has the power to pass particular kinds of legislation. We will focus on public employees. But keep in mind that this context is broader. The question of who has what power remains important, if not outcome-determinative in these cases.

As I mentioned earlier, the term federalism means simply: a balance of power between the states and the central government. This type of federated system of government can contrast with a purely national government—France is an example—wherein any local governmental entity is solely a creature of the national government and has no independent powers. The federal/state balance(s) may shift at various times. The balance between the two may involve different powers with respect to different kinds of issues. For instance, in this country education has traditionally been thought of as a

state function, as has family law. The Federal government has sole authority over national security, armies and navies, immigration, etc. But there's a tremendous gray area in between these two areas and thus tremendous room for controversy over which level of government can regulate a range of subjects. Federalism itself is, or should be, value neutral though those of us who grew up in the civil rights era tend to think of "states rights" as being something that is about preserving racial segregation and thus a negative value while the federal government is seen as somehow representing the greater good. But we must remember that such a view is and was tied to a particular time and place.

Next, let's look at the theoretical constitutional underpinnings of the federalism revolution, and in so doing take quick review of the only real innovation of the Rehnquist Court and what will probably be the late Chief Justice's most important legacy. This revolution (not too strong a term) involves a radical reinterpretation of several constitutional provisions. I'll discuss just four for the moment: the 11th amendment, Section 5 of the 14th Amendment, the Commerce Clause, and the Spending Power.

The 11th Amendment: Sovereign Immunity?

There's been reference here today to the concept of "sovereign immunity." Please be aware, however, that the term "sovereign immunity" can be found nowhere in the United States Constitution—I promise you it's not there. Somehow the notion that sovereign immunity is required under the Constitution has arisen from the 11th Amendment. I'm going to read you the entire text of the 11th Amendment:

"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 Citizens or Subjects of any Foreign State.”

In other words, under the language I cannot go into a *federal court* and sue the state of New Jersey since I live in New York and I’m a *citizen of the state of New York*. I cannot sue the state of New Jersey in federal court. That is what the 11th Amendment says and, therefore, that is what it means, right? The federal court has no jurisdiction to hear that case. It does not say that I cannot go into a New Jersey state court and sue the state of New Jersey. And it certainly does not say that, I, as a citizen of New York cannot sue my own state in any court. It cannot mean that, can it? Arch conservatives, such as Justice Scalia, argue that the text of the Constitution (and statutes) must be understood to mean what its words say, and that it is only liberals who distort the clear meanings of the text. But, guess what, despite that supposed view the conservatives who dominate the Supreme Court, the 11th Amendment has come to mean, in a very twisted and circuitous way, that because of “sovereign immunity,” (and because of the newly invented concept of “sovereign *dignity*”) I, as a citizen of New York, cannot sue the state of New York in either state or federal court (or in an administrative agency) and I cannot sue the state of New Jersey in any forum either.

The term and the idea of sovereign immunity were inherited from the British—the idea of sovereign dignity would be new to our former rulers. Our Founding Fathers, though, never used that term sovereign immunity and they did not particularly like it because it really means that ordinary citizens cannot sue the king. The founders were, of course, not fond of the king; they did not want to have a king and, therefore, had absolutely no interest in sovereign immunity. The 11th Amendment was placed in the Constitution to prevent recovery in federal courts, by foreigners and out-of-state residents, of the revolutionary war debts run up by the states. They would instead be

forced to go into the state courts, which was more inconvenient and expensive back then. In 1890, after the Civil War, in a case called *Hans v. Louisiana*,³—brought to us by the same court that brought us *Plessey v. Ferguson*,⁴—the Supreme Court said that the 11th Amendment provides the states a form of sovereign immunity and thus *should*—though the plain language does not say so, be applied to citizens of the *same state*. In other words, citizens of the same state could no longer sue their own state government. (Again, it appears that the underlying concern was to make it difficult to collect war debts.) The 11th Amendment, as we have seen, says no such thing, but that is what the Supreme Court decreed it means.

Now this is what I call *not* strict construction. Importing the concept of sovereign immunity into the United States Constitution is reading into it a meaning that is simply not there. But this is 1890, and this holding is so old that it has now gone beyond the reach of later courts, although, the Supreme Court could theoretically look at it again.

Just as the Warren Court revisited *Plessey v. Ferguson*, in 1954, another Supreme Court could someday revisit *Hans v. Louisiana*. Instead of doing that, the Rehnquist Court pushed the notion of sovereign immunity even further. The Rehnquist Court set about tremendously broadening the already stretched meaning of 11th Amendment sovereign immunity. They have used words like state “dignity,” as in: it is an affront to the dignity of the state to allow its own citizens to sue it. In *Alden v. Maine*,⁵ in 1999, the Supreme Court said employees of the state of Maine could not enforce the federal Fair Labor Standards Act (FLSA) against their employer (the state of Maine), which was violating the overtime provisions of the FLSA, even in state court. Since they could no longer bring their case in federal court, they sued their state employer in state court, but the Supreme Court prohibited even that. Keep in mind that the 11th Amendment says nothing about “state judicial power” only federal.

In 2000, in a case called *Kimel v. the Florida Board of Regents*,⁶ the Supreme Court held that state employees cannot enforce the federal Age Discrimination in Employment Act (ADEA) against the state employer. The following year, in 2001, in the *Board of Trustees of the University of Alabama v. Garrett*,⁷ the Court held that state workers cannot enforce the federal Americans with Disabilities Act (ADA). This was a particularly egregious case. Patricia Garrett was a nurse at the University of Alabama Hospital. She developed breast cancer and had to take some time off for chemotherapy. When she returned she found that she had been demoted. If you are keeping track, all this means that even if state officials openly violate these (and other) federal law, their employees are now helpless to do anything about it.

It gets worse. *Federal Maritime Commission v. South Carolina Ports Authority*⁸ is a case that went largely unnoticed. In it the Court held that individuals may not haul non-compliant state governments before federal administrative agencies charged with enforcing federal law. Again where's the *judicial* power referred to in the 11th Amendment? These agencies exercise administrative power or executive power. Yet, in this case, the Supreme Court said that individuals cannot even go to federal administrative agencies to hold state authorities responsible for obeying federal laws.

This approach clearly puts the interests of states ahead of the interests of people. The Court is so interested in the dignity of the states that they lose sight of the dignity of people. And, as I have said, it has been state employees who felt the brunt of these decisions. But this trend may very likely affect local government employees as well. There are a number of lower court decisions that are wending their way up to the Supreme Court—they will get there sooner or later—that have held that sovereign immunity protects any governmental entity that was created under state law. Depending on the particular state constitutions and state laws this theory could result

in making school districts, park districts, even cities which are chartered by the state, or counties which are creatures of the state government, also immune to lawsuits by their own employees. There are reasons why private employees should worry too, but we'll get to that in a minute.

The 14th Amendment: Section 5

In the wake of the Civil War, which we might have thought would have settled the question of states rights versus federal government, the 14th Amendment, including the Equal Protection Clause, was passed. At least with respect to civil rights, the 14th Amendment presumably abrogated whatever state immunity there was, or so you would think. But no, it turns out that is not true. After the end of Reconstruction and again now in the wake of the Civil Rights Era, as part of the new federalism, the Supreme Court has made a hash out of the 14th Amendment as well. And again, very little notice,

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very little outrage on the part of people affected by it. They have done this is by construing Section 5 of the 14th Amendment in a very, very narrow way. Section 5 of the 14th Amendment says: "Congress shall have the power to enforce by appropriate legislation the provisions of this court." That's all it says. It's sort of like an enforcement provision. The Court has narrowed that tremendously.

In the Civil Rights Era, in the 1960s and 1970s, the courts gave Congress great deference, and the presumption was that in passing civil rights legislation, the Congress was acting within the scope of its authority, not only to enforce civil rights, but at least in some degree, to define the constitutional right in question. But no more, no more. Now the

Congress has been told by the Supreme Court that they have only very narrow scope of authority, basically nothing broader than what the Court in its 14th Amendment decisions says that authority might be. The burden of proof, so to speak, has shifted to the Congress to show that it has the power to pass legislation. Now there is virtually a presumption that Congress has exceeded its authority when it passes any kind of civil rights legislation. Congress must prove under very steep, trial-like burden of proof that it had sufficient authority. Keep in mind that the ADEA and the ADA were passed before the Court announced or Congress

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even could possibly have understood that it had to make all these findings of fact in order to support its authority to act. Nevertheless, in the *Kimel* case, the Court said that Congress had no grounds for applying the ADEA to the states because there was insufficient evidence in the Congressional record to show

that the states had violated any employees' rights to be free of age discrimination. In the *Garrett* case they reached the same conclusion with respect to the ADA and disability discrimination by the states. As a matter of fact however, in passing the ADA, Congress made a huge number of findings of fact of age and disability discrimination practiced by the states, not only against employees, but also against citizens generally. This wasn't deemed to be good enough.

In 2003, the most recent decision of the Supreme Court on the power of Congress to enact civil rights legislation, the Court decided the case of *Nevada Dept. of Human Resources v. Hibbs*.⁹ This case concerned the applicability of the

Family Medical Leave Act (FMLA) to the states. Pleasant surprise: the Court ruled that the requirement to provide at least twelve weeks of unpaid family leave to employees needing to care for newborn or newly adopted children or for seriously ill dependents *could* be applied to the states. A lot of people, including Linda Greenhouse, the brilliant Supreme Court reporter for the *New York Times* thought, oh great, this signals the end of the new federalism. Well, think again Linda. I'll tell you why. *Hibbs* was a 6-3 decision in which Rehnquist, unexpectedly, and O'Connor, more expectedly, crossed over to the side in favor of state employees seeking to enforce the FMLA against their employers. But, notice these are two justices who are about to be replaced. Chief Justice Roberts has already replaced Rehnquist, and O'Connor is about to be replaced, probably with Judge Alito. One of the many things we know about Judge Alito is that when he had this very issue in front of him in the Third Circuit Court of Appeals, he ruled the other way. Not only that, but the question in *Hibbs* was confined to the family leave portion of the Act, in other words, the part that gives workers the right to take off time to be with family members. It did not involve the so-called self-care leave part, the medical leave portion of the law. We must be prepared, therefore, to see the medical leave portion of the FMLA challenged, and I cannot be very optimistic about the outcome, even if the Court does not go back and reverse its holding with respect to the family leave portion.

The Commerce Clause

Finally, we come to the Interstate Commerce Clause of the Constitution. This is the provision that gives the Congress the power to regulate commerce between and among the states. The Commerce Clause provides the constitutional basis for a host of the laws and regulations that we all routinely take for granted—the labor laws, the environment laws, most importantly in this context,

the civil rights laws. In particular, Congress used the Commerce Clause to apply the civil rights laws to private employers. They were able to do this because of the impact of discrimination on the economy. The Supreme Court's questioning of Congressional authority under the Commerce Clause is a new phenomenon. From 1937 when the Court made the famous "switch in time saves nine" and began to uphold New Deal legislation, until 1995, the Supreme Court had never invalidated a Congressional enactment that had been passed pursuant to the Commerce Clause power. In a decision in *United States v. Lopez*,¹⁰ the Court invalidated the Gun Free Schools Act, saying that Congress lacked the power to pass it.

But that was just the beginning. In *The United States v. Morrison*,¹¹ the Court invalidated the Violence Against Women Act (VAWA) on the grounds that it involved two areas of government—criminal law and domestic relations—that are meant to be controlled by state not federal government and that do not involve interstate commerce. This was despite the fact that there was a humongous Congressional record documenting the huge effect of violence against women on interstate commerce.

The Spending Power

There are three legs to the stool that holds up civil rights legislation. Those three legs are the 14th Amendment; the Commerce Clause, which we have just discussed; and the third one is the so-called spending power, which is derived from the "General Welfare Clause" in the Preamble of the Constitution. It is the third leg and arguably the only one left undamaged at this point. The spending power is what gives us Title VI of the Civil Rights Act prohibiting discrimination on the basis of race or national origin in all federally funded programs; Title IX of the Education Amendments of 1972 which prohibits discrimination on the basis of gender in federally funded education programs; and

Section 504 of the Rehabilitation Act which prohibits disability discrimination in federally funded programs. Interestingly, this is where I depend on the sophistication of this audience. I have a lot of trouble making civil rights advocates understand that the spending power can be a two-edged sword. Relying on the spending power is great when the liberals are in power and passing progressive legislation. When the conservatives are in power, however, and passing regressive legislation and then requiring the more progressive states to follow it—then I'm not so sure. Think about this. My favorite example is No Child Left Behind (NCLB.) Here you have a so-called "small government" conservative administration, "states rights" advocates, "leave the education to the states" types, who meanwhile have passed this huge government program of federal regulation of education, forcing it down the throats of states and localities without fully funding it—all based on the spending power of the federal Constitution. So just keep that in mind when considering whether, in the long run, spending power legislation and what often comes with it, *i.e.*, requirements that the federal government could not otherwise impose, an example: Medicare requires marriage counseling before you can get other kinds of reproductive health services and prohibits, of course, abortions or even abortion counseling by doctors—a clear violation of free speech if the receipt of federal money were not the pre-condition. And there are other problems with reliance on spending power. For example, it is not entirely clear whether and to what extent beneficiaries of these programs have independent litigation rights under the spending power. The courts have been cutting back on that as well.

Now, to put all of this into a particular context: In the report, "Toward A More Perfect Union: Understanding and Countering the Federalism Revolution," I propose several lenses or perspectives with which to analyze the new federalism. Although the report was published a few years ago,

in many ways it still works and in some ways it's even stronger. The first lens is the states' rights lens; the second lens focuses on the limitations on democracy, the restrictions on Congressional authority; the third lens looks at the aspect of the limitations on access to courts; the fourth is the civil rights lens; and the fifth is the anti-government lens.

The states' rights lens is perhaps the most intriguing because although in some cases the Supreme Court is giving power back to the states, and thereby taking power away from the federal government, in other instances it is doing just the opposite. The idea that the current Court is uniformly in favor of states' right is very misleading. There are a number of issues in which the outcome will vary depending on who is in power at a particular level of government and what they are seeking to accomplish with that power. Now that Republicans control the federal government, we will see a shift to a preference for federal government power. Preemption of progressive state legislation is one area where we see arguments accepted by the so-called "federalist five" on the Supreme Court that hold state laws permitting the use of marijuana for medical purposes are preempted by federal drug laws. Another example is so-called "tort reform" a favorite issue of the Right. They want to make it much more difficult for individuals to sue corporations for various sorts of injuries. Despite that fact that tort law has always been a quintessentially state law function, they are seeking to use federal law to weaken plaintiffs' rights by using the Commerce Clause. They argue that all these lawsuits are having a deleterious effect on interstate commerce and therefore they must be restricted. This movement is already under way in the malpractice area.

I mentioned the medical marijuana case, *Gonzales v. Raich*.¹² This case caused a flip-flop by states' rights advocates. All of a sudden a case was brought by the federal government to enforce federal drug laws against the medical use of marijuana

raised entirely within the state of California, and sold only in the state of California, regulated for medical purposes—not a permissible use of federal authority under the Commerce Clause. Regardless of how you feel about it, you have to ask "doesn't it begin to look like the results in some of these cases sort of depend on whose ox is being gored?" Reproductive rights and voting rights are other areas where the Right wants to restrict what were traditionally state areas of regulation. With respect to election law we have the mother of all anti-states' rights decisions: *Bush v. Gore*.¹³ With respect to reproductive rights: watch and see what will happen if and when *Roe v. Wade* is overruled. The anti-choice folks will be looking for ways to prevent even the individual states from allowing women to choose abortion. Suffice it to say that saying that this movement is about enhancing states' rights is doubletalk. The so-called federalists are no champions of the states *per se* but rather seek their ends at whatever level of government will work for them at any given moment.

However, by focusing on the undermining of Congressional authority by the judicial branch we begin to come close to the heart of what is going on. The Supreme Court has been quietly changing the structure of our government by invalidating laws passed by the elected Legislature, on the grounds that the Congress lacks the authority to pass these laws in the first place. This abrogation of power is taking away from Legislature's power to define what civil rights are. And it goes against the entire history of constitutional law, starting with *McCulloch v. Maryland*,¹⁴ in 1819, which first held that the courts may not invalidate a congressional enactment unless it failed the rational basis test.

Now the decision in *Hibbs*¹⁵ would seem to contradict the general trend toward invalidating civil rights statutes and upheld the application of the Family and Medical Leave Act to the states. In that case, O'Connor switched sides. The one area of civil rights that she's always understood very well

is women's rights because she's been affected by sex discrimination. But, why did Rehnquist also switch sides? I have a very simple explanation. He saw he was going to lose, because O'Connor was switching, and so he wanted to be the one to write the decision. As a result, the decision was entirely supportive of all the prior federalism decisions rather than in any way undermining them. I promise you if Stevens or Ginsburg had written the *Hibbs* decision, they would have taken the opportunity to undermine some of the federalist positions. But they didn't get the chance to do it. Simple as that. And again, those two folks who switched sides, O'Connor and Rehnquist, are no longer there to rule on new cases as they come along.

These decisions also restrict access to courts, but there are a lot of other ways that the Right is restricting access to the courts. For example: forced arbitration procedures in situations where one was formerly able to sue in court; limitations on private rights of action; limitations on court ordered attorneys fees; limitations on standing to sue; limitations on the right to bring class action suits; limited funding for legal services; tort reforms; securities litigation reform; prison litigation reform—the list goes on. All of these methods are barring access to the court doors.

The fourth lens is the anti-civil rights lens. The court decisions and policy decisions of the Right are ideologically driven. They don't like these even basic civil rights laws and they certainly like even less the extension of civil rights legislation to new groups, such as the elderly or the disabled.

But the unifying ideology is, I believe, a profound antagonism to all government regulation pertaining to business interests in the provision of social services, though, of course, not necessarily to the regulation of what goes on in your bedroom— that kind of regulation is OK with these folks—but anything regulating business interests goes against their grain. Though some true liber-

tarians would include private personal conduct as something they would like to not see regulated, but they don't hold the ascendancy of the right so their distaste for government interference does not extend to the regulation of private sexual activity, regulation of health, religious or cultural values or, of course, regulation for the purposes of national security, as defined solely by the President. So, I believe that focusing on this overarching hostility to active government as a way to address pressing social issues begins to get at the real motivation behind federalism. Ronald Reagan said it all at his first inaugural when he said that "government is not the solution to the problem, government is the problem." When you add the tax cuts that are not just a gift to the wealthy, by the way, but a way to make social programs and government programs impossible to afford, you have a recipe to starve the programs and services and you begin to see the pattern. Look at the impact of the tax cuts on state and local governments which you have all seen. Grover Norquist of the Americans for Tax Reform has famously said that he wants to shrink the government to the point that it is small enough to drown in the bathtub—and that refers to state and local governments, not just federal. They just don't like government.

And what are their tools? In addition to using the courts as they have in various kinds of constitutional arguments, you can add privatizing of government functions and outsourcing of jobs, privatizing education, keeping healthcare private, making it both constitutionally and financially impossible to operate an active government, repealing the

Federalism ... is just one of the Right's weapons in their arsenal of 'weapons of mass deception.'

Great Society, and coming soon, if possible, repealing the New Deal as well. They would like to return to the era when neither the federal nor state governments could regulate the excesses of big business. So if you can afford healthcare, if you can afford education, either through private school or vouchers (because the right to public education is under threat as well), if you can afford decent housing, if you can afford police protection and gated communities, and if you can afford justice through arbitration and through high-powered attorneys, then you can have these things.

So what's the conclusion? There are no easy answers in this political climate. The progressive

groups, such as public employee unions, must begin to rebuild progressive and political and social movements at the grassroots. You are the prime target of the new federalism, and therefore you are the ones who need to lead this charge. We need to educate ourselves and others about the fact that the Right is systematically disassembling the infrastructure of government—the very government's capacity to provide things that Americans have come to expect from their government at whatever level—and incidentally your jobs. Federalism as it turns out is just one of the Right's weapons in their arsenal of “weapons of mass deception.” Their true agenda is just what they've always said—”to end the government as we have always known it.”

ENDNOTES

¹ Lewis Carroll, *Through the Looking Glass*, Chapter 6.

² George Orwell, *1984*.

³ 134 U.S. 1 (1890)

⁴ 163 U.S. 537 (1896)

⁵ 527 U.S. 706 (1999).

⁶ 528 U.S. 62 (2000)

⁷ 121 S. Ct. 765 (2001)

⁸ 122 S. Ct. 1864 (2002) [get U.S. cite]

⁹ 538 U.S. 721 (2003)

¹⁰ 514 U.S. 549 (1995).

¹¹ 529 U.S. 598 (2000).

¹² 125 S. Ct. 2195 (2005)

¹³ 531 U.S. 98 (2000)

¹⁴ 17 U.S. (4 Wheat.) 316 (1819)

¹⁵ Fn. (*supra*)