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Alexander Hamilton Wins

During the debate on the federal Constitution in Philadelphia in the summer of 1787, Alexander Hamilton, the prodigy mentored by George Washington who ultimately wrote most of the Federalist Papers to justify the Constitution and who created the modern United States banking system, argued for supreme federal sovereignty. In Alexander Hamilton's view, the states, as separate political entities, would simply wither away. Hamilton's views, rejected by the constitutional convention, whose work product Alexander Hamilton later vociferously defended, was not a Monarchist as his critics claimed. Rather, Hamilton was interested in seeing a unified nation whose strands were woven together by commerce. Many say that Hamilton was the nation's first true capitalist, freed from the fiction of an agrarian utopia ruled by educated landed gentry like Thomas Jefferson.

Hamilton's views of the role of the federal government were rejected by subsequent generations, especially those who supported state's rights. The Kentucky resolutions, asserting that the states had a right to ignore federal power where there was a federal intrusion upon state sovereignty, was the direct parent of the Civil War spirit which tore our nation asunder. Those sympathetic to Alexander Hamilton's views in later years realized that had the federal government

been supreme, and the states subjugated, there might never have been a Civil War or the racial divide that followed and still haunts us today.

It may very well be that Alexander Hamilton got his way, as demonstrated by a trilogy of United States Supreme Court cases recently decided. Those cases, known as *Preston v. Ferrer, Roe v. New Hampshire Motor Transportation Association,* and *Riegel v. Medtronic, Inc.*, hammer together a coalition of conservatives and liberals to create a breathtaking expanse of federal domain in the legal field, the likes of which would be applauded by the ghost of Alexander Hamilton. *Preston v. Ferrer* raised the prosaic question of whether the Federal Arbitration Act trumps state law. The Federal Arbitration Act is a federal law justified under the Commerce Clause of the federal Constitution, stating that when parties agree to arbitrate a dispute, instead of going to court or some other state mandated Alternative Dispute Resolution, the parties must follow that contractual agreement regardless of state law. That a federal law can require disputants to follow their agreement rather than state law was announced by one of the most liberal members of the court, Ruth Bader Ginsburg.

The *Roe v. New Hampshire Motor Transportation Association* opinion was delivered by the second most liberal member of the court, Justice Stephen Breyer. In *Roe*, it was decided that a Maine tobacco law regulating the delivery of tobacco to customers within the state

was preempted by federal law relating to motor carrier price, route or service. Traditionally, health measures were reserved to the states. The second most conservative member of the court, Justice Antonin Scalia, could barely muster an opinion one paragraph long concurring in part along with Justice Ginsburg. Strange bedfellows, in the *Roe* case.

The final case in the trilogy is *Riegel v. Medtronic, Inc.*, which more dramatically showed the division of the court. Justice Scalia, delivering the opinion of the court, held that the Medical Device Amendments of 1976 preempted state common-law challenging the safety and effectiveness of a medical device given premarket approval by the Food and Drug Administration. The conservative's opinion, interestingly, was responded to by a vigorous dissent on the part of Justice Ginsburg, who had voted for domination of federal laws over state in the two prior opinions!

In *Riegel*, the court addressed a balloon catheter marketed by Medtronic which was a Class III device that received premarket approval from the FDA in 1994. While federal manufacturing and labeling requirements applicable across the board to almost all medical devices do not preempt common law state claims of negligence and strict liability in prior decisions, the opposite result was reached in *Riegel*. Premarket approval is specific to individual devices. Once the weak and ineffective regulators at the FDA find that a particular device is safe, state control by judges and

juries over dangerous devices must simply evaporate.

The justices, regardless of their stripes, have essentially put the state legislatures and courts on notice that federal law will be supreme thanks to the sweeping interpretation given to the commerce clause in the federal Constitution by the last 50 years of jurisprudence. This proves demonstrably that whether one is labeled as a liberal or conservative, Justices of the United States Supreme Court buy into the principle that the federal government is and shall be the supreme law of the land regardless of state interests to the contrary.

There are those who will argue that Alexander Hamilton was correct and that we need a single set of laws to weave our nation into a strong tapestry. Others will long for the days when states were able to protect their own citizens, knowing full well that the revolving door of special interest groups and the government could not possibly address the myriad of wrongs committed by industries voracious for a bottom line pleasing to their investors.

The evolution of American law must be ever attentive to its historical past and aware that Shakespeare, in *The Tempest*, was accurate when he said “what is past is prologue,” which interestingly is also carved on the National Archives Building in Washington, DC.

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